No. 916

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917

THOMAS J. EVANS, Sole Surviving Receiver of the Citizens & Screven County Bank,

vs.

NATIONAL BANK OF SAVANNAH.

Petition for Writ of Certiorari to the Court of Appeals, of the State of Georgia.

BRIEF FOR RESPONDENT

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Counsel for Respondent.

BRAID & HUTTON, INC., PRINTERS AND STATIONERS, SAVANNAH, GA.

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THOMAS J. EVANS, Sole Surviving Receiver of the Citizens & Screven County Bank, vs. NATIONAL BANK OF SAVANNAH.	Petition for Writ of Certiorari to the Court of Appeals, of the State of Georgia.

BRIEF FOR RESPONDENT

This is a suit brought in the Superior Court of Chatham County, Georgia, by the Receivers of the Citizens and Screven County Bank, petitioner here for the writ of certiorari, against The National Bank of Savannah, respondent to the petition for writ of certiorari, which demurred to the petition. The demurrer was sustained and the petition dismissed. Thereupon the Receivers took the case by writ of error to the Court of Appeals of Georgia, where the decision was affirmed.

Thereupon the Receivers applied to the Supreme Court of Georgia for a writ of certiorari to review the decision of the Court of Appeals, the writ was denied.

The petitioner has now applied to this Court for a writ of certiorari.

WE SUBMIT THAT THERE IS ONLY ONE FEDERAL QUESTION INVOLVED IN THIS CASE AND THAT IS WHETHER A NATIONAL BANK DOING BUSINESS IN THE STATE OF GEORGIA HAS THE RIGHT TO TAKE INTEREST IN ADVANCE AT THE HIGHEST RATE ALLOWED BY THE STATE UNDER THE PROVISIONS OF SECTION 5197 OF THE REVISED STATUTES OF THE UNITED STATES WHICH PERMITS DISCOUNTS AT THE RATE ALLOWED BY THE LAW OF THE STATE WHERE THE NATIONAL BANK IS LOCATED.

STATEMENT OF THE CASE

The Plaintiffs alleged in substance that The National Bank had knowingly received, charged, and taken from The Citizens and Screven County Bank interest in excess of the highest contractual rate allowed under the laws of the State of Georgia, and an exhibit was attached showing a list of the amount of loans made, the date when made, and the amount of and time when, interest charged, reserved, and received by the Defendant was paid by the Plaintiff, and the amount of interest in excess of the legal or contractual rate allowed by law.

The list shows the interest charged in advance and deducted, the interest at 8% (which is the highest rate allowed by the laws of the State of Georgia) on the amount actually loaned, and excess over the highest contractual rate.

By amendment the Plaintiffs alleged that the Defendant bank charged a discount against the said respective loans of the amount set forth in the column of said exhibit marked and headed "Interest charged in advance and deducted," and only passed to the credit of The Citizens & Screven County Bank the difference between the amount of such discount and the amount called for by the said notes.

In substance, the petition alleged that the usury included all interest charged by The National Bank of Savannah against The Citizens & Screven County Bank, by which the amount actually charged in advance and deducted exceeded the interest at 8% on the amount actually loaned for the time of the loan.

It will be observed that, while the Plaintiffs alleged that they have calculated interest at 8% on the amount actually loaned, they mean interest at 8% on the amount actually received by The Citizens & Screven County Bank, or to express it differently, they take the amount actually received by The Citizens & Screven County Bank, calculate 8% on that amount for the time of the loan, and then allege that all interest in excess of that amount charged by the National Bank is usury.

In addition, the Plaintiffs allege that the Defendant National Bank further took, reserved, and charged a rate of interest greater than is allowed by law in that it was understood and agreed at the time of making all of said loans between the borrower and the lender, that The Citizens & Screven County Bank should at all times, while it was a borrower, keep on deposit with The National Bank at least the sum of $10,709.31, which could only be used towards the payment of said indebtedness, that such deposit was continuously and uninterruptedly maintained by the borrower under such requirement with The National Bank, from November 2, 1914, till November 17, 1915, all of which was knowingly done for the purpose of exacting usury.

Thereupon the Plaintiffs alleged that they were entitled to recover from The National Bank the sum of $17,675.04, being double the amount of interest alleged to have been paid. The amendment further alleged the payment of the amounts alleged to have been charged as usury, and reduced the amount of the claim to $14,676.44.

To this petition The National Bank filed its demurrer, and, when the amendment was allowed, it again demurred to the petition as amended, and it was this demurrer which was sustained by the Superior Court of Chatham County.

The grounds of the demurrer were in substance as follows:

1. That the petition did not set forth a cause of action.

2. That the said petition is a petition to recover double interest by reason of the usury charged, and that the usury is not set forth with sufficient particularity, and there is no allegation in the said petition of the payment of the usurious interest.

The substance of the **third, fourth and fifth grounds of demurrer** is that the petition is insufficient in that the petition undertook to charge usury by merely setting up the date of the loan, the maturity of the loan (that is, number of days to maturity), amount of loan, interest charged in advance and deducted, interest at 8 per cent. on the amount actually loaned (that is, received by borrower) and the alleged excess over the highest contractual rate, and that said alleged statement of usury is insufficient in that there is no inhibition under the laws of the United States against charging interest in advance by way of discount at the highest rate allowed by the laws of the State (the statute on this subject will be set out herein later), and said laws allow a National Bank to charge interest in advance at the

rate of 8 per cent. per annum, being the highest rate allowed by the laws of Georgia, so that the alleged schedule of usury is defective in that it does not calculate interest on the face of the note, but on the amount alleged to be actually loaned.

That the allegations that The National Bank knowingly had received from The Citizens & Screven County Bank a rate of interest greater than is allowed by law are incorrect and insufficient in that the Exhibit referred to does not show whether or not the amount charged is in excess of 8 per cent. per annum in advance on the face of the note; the amount on which usury is to be charged is on the face of the note and not on the amount actually loaned; in other words, under the statute of the United States a discount of 8 per cent. in advance for the time of the loan deducted from the loan so that the borrower receives only the face of the note less 8 per cent. interest in advance for the time of the loan does not constitute usury and is not unlawful under the statute of the United States.

That the schedule referred to in paragraph 3 does not show usury paid on the respective amounts set out in that the interest charged and reserved is not under the laws of the United States charged and reserved on the amount of the loan after deducting the discount, but on the amount of the loan before deducting the discount and the allegations of usury paid are incorrect in that such allegations show payment of interest charged on the amount of loan after deducting the interest instead of calculating interest on the amount of loan before deducting discount.

The sixth ground of the demurrer is that the allegations in reference to the special deposit were vague, indefinite, and insufficient and do not, of themselves or as construed with the rest of the petition, constitute usury under the laws of the United States.

The seventh ground is that the allegations of payment of usury are insufficient in that the usury not being correctly set forth, as hereinbefore set out, the payment thereof could not constitute usury.

The Superior Court of Chatham County, Georgia, sustained the demurrer to the amended petition and dismissed it.

Thereupon the Plaintiffs took the case to the Court of Appeals of Georgia, which affirmed the judgment of the Superior Court of Chatham County, Georgia.

Thereupon the Plaintiffs applied for a writ of certiorari to the Supreme Court of Georgia, which denied the application for the writ.

The Plaintiffs are now applying to this Court for the writ of certiorari.

LAW POINTS

In entering upon a discussion of the law points involved in this case, we think we should call to the attention of the Court that the main question involved in this case is whether or not The National Bank of Savannah had a right to charge 8 per cent. in advance on the loans and discounts made.

This arises in the following manner: The Plaintiffs have alleged that The National Bank charged usury and that the usury consisted in charging an amount in excess of the highest legal rate.

In order to arrive at the amount charged in excess of the highest legal rate, to-wit, 8 per cent., they state the amount of each loan, then the amount that was deducted by way of interest from that loan by The National Bank, and they calculate that all is usury in excess of the differ-

ence between 8 per cent. on the amount actually received for the time of the loan and the amount actually charged as interest.

Therefore, there can be no other way of viewing the allegations of the petition than that the pleader charges that all is usury that exceeds 8 per cent. for the time of loan on the amount actually received by way of loan, in other words, that 8 per cent. in advance on the amount of the loan before deducting the interest is usury.

We think that the question at issue may be for convenience set out in the following propositions and we will hereinafter demonstrate their correctness.

1. The Acts of Congress, providing for the creation and operation of National Banks, are the charter of such banks, and their terms and provisions are alone applicable to National Banks.

2. The Acts of Congress, as construed by the Courts of the United States, are the law of the land, and the Courts of all the States are bound, in all matters relating to the National Bank Act, to conform their opinions and decisions to the construction of that law as announced by the United States Courts.

3. Under the National Bank Act, not only by its express language, but also as construed by the United States Courts, National Banks are permitted to take discount at the highest legal rate authorized by the laws of the State, in which such bank does business, and thus in Georgia, discounting at 8% does not constitute usury, although, if done by a State bank, it would be usurious.

4. The writ of certiorari should not be granted on the only federal question involved in this case.

5. The writ of certiorari should not be granted on the points in this case not involving federal questions.

6. The special deposit involved in this case, if usurious, does not warrant the granting of the writ of certiorari.

7. The usury, alleged in this case, is not so pleaded as to warrant a recovery under Georgia law.

8. Contentions of the petitioner.

Of each of these in their turn.

I.

THE ACTS OF CONGRESS PROVIDING FOR THE CREATION AND OPERATION OF NATIONAL BANKS, ARE THE CHARTER OF SUCH BANKS, AND THEIR TERMS AND PROVISIONS ARE ALONE APPLICABLE TO NATIONAL BANKS.

We quote the following as being the material portions of the charter of National Banks as set out in the Acts of Congress, so far as they relate to the case at bar.

Sections 5197, 5198, and also the 7th paragraph of Section 5136 of the Revised Statutes of the United States as they will be referred to hereinafter are now set out in full.

"RATE OF INTEREST LIMITED.

"Section 5197.—Any association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or district where the bank is located, and no more, except that where by the laws of any State a different rate

is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this Title. When no rate is fixed by the laws of the State, or Territory, or district, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days from which the note, bill, or other evidence of debt has to run. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight-drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest."

"PENALTY FOR TAKING USURIOUS INTEREST.

"Section 5198.—The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred."

"SECTION 5136 STATES THE CORPORATE POWERS OF BANKING CORPORATIONS, AND THE SEVENTH PARAGRAPH THEREOF FOLLOWS:

"Seventh. To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory

notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this Title."

The following from the Supreme Court of the United States sufficiently shows the soundness of proposition laid down.

Farmers & Mechanics National Bank vs. Dearing, 91st United States, pages 29-33, the Court lays down the principles governing National Banks as follows: "The National Banks organized under the act are instruments designed to be used, to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which existed for creating them, Congress is the sole judge.

Being such means, brought into existence for this purpose, and intended to be so employed, the States can exercise no control over them, nor in anywise affect their operation, except in so far as Congress may see proper to permit. Anything beyond this is 'an abuse, because it is the usurpation of power, which a single State can not give.' Against the National will, 'the States have no power, by taxation or otherwise, to retard, impede, burthen, or in any manner control the operation of the Constitutional laws enacted by Congress to carry into execution the powers vested in the General Government.'"

This matter has been also passed on by the Court of Appeals of Georgia as follows:

"Whenever the power or liability of a National Bank is called into question, necessarily a Federal question is involved, and consequently the United States Supreme Court

is the ultimate and paramount authority on the subject; and all authorities of State Courts to the contrary must yield. California National Bank vs. Kennedy, 167 U. S. 362 (42 L. ed., 198). These institutions are so far governmental agencies of the United States as that neither State statutes nor State decisions can impose any liability inconsistent with the liability intended by the Federal statutes, as construed by the Supreme Court of the United States."

Hansford vs. National Bank of Tifton. 10 Ga. App., 270.

The authorities cited under the next heading also apply here.

II.

THE ACTS OF CONGRESS, AS CONSTRUED BY THE COURTS OF THE UNITED STATES, ARE THE LAW OF THE LAND, AND THE COURTS OF ALL THE STATES ARE BOUND, IN ALL MATTERS RELATING TO THE NATIONAL BANK ACT, TO CONFORM THEIR OPINIONS AND DECISIONS TO THE CONSTRUCTION OF THAT LAW AS ANNOUNCED BY THE UNITED STATES COURTS.

This proposition has been thoroughly established, both in the Supreme Court of the United States, and State Supreme Courts throughout the United States, including the Supreme Court of Georgia.

We might cite many authorities, but we deem it unnecessary, and will simply refer to the following, which we think amply demonstrate our proposition.

In the case of **Bates vs. The First National Bank of Dalton, 111 Ga., pp. 757-758,** it is held that while the rate of

interest which a National Bank is authorized to charge is covered by the law of the State in which the bank is located, **"the penalty to be imposed upon such a bank for exacting usury is that prescribed by the Act of Congress providing for the creation of National Banks."** This case quoted on page **758**, with approval, the case of **Farmers & Mechanics National Bank vs. Dearing, 91 U. S., p. 29**; and, also, **Barnett vs. Bank, 98 U. S., p. 555.**

In the case of **First National Bank of Dalton vs. McEntire, 112 Ga., p. 232,** it is held that the penalty prescribed in Section 5198 of the Revised Statutes of the United States upon National Banks for charging usury is **exclusive,** and quotes a number of authorities sustaining this proposition on page **235.** And, consequently, this case distinguishes between a State Bank and a National Bank, and holds that a waiver of homestead and exemption in a promissory note, infected with usury, is not void when the note is payable at a National Bank, though it would be at a State Bank.

The United States Supreme Court, in discussing a usury case holds as follows: **"The statutes of Ohio and Indiana on the subject of usury may be laid out of view. They can not affect the case." Barnett vs. National Bank, 98 U. S., 555, 558.**

This subject has also been dealt with by the Court of Appeals of Georgia in **Reese vs. Colquitt National Bank, 12th Ga. Appl., page 472,** where it is held that State statutes relating to usury, and prescribing penalties for the charging, reserving or taking of usury have no application to negotiable instruments held by National Banks. The penalties fixed by the United States Revised Statutes, section 5198, against National Banks for "the taking, receiving, reserving or charging" of usury, and the remedy given by the Act of Con-

gress against National Banks for taking usurious interest, **are exclusive. First National Bank against Davis, 135 Ga., 687, 691.**

And again in **183 U. S., page 134.** Haseltine vs. Bank, in a National Bank case, the note in question having been given to a National Bank, the Court says "**The definition of usury, and the penalties fixed thereto must be determined by The National Banking Act, and not by the laws of the State**" quoting **Farmers & Mechanics National Bank vs. Dearing, 91st U. S., page 29.**

In the case cited in **135 Ga.,** it is held "**but the remedy given by the Act of Congress against National Banks for taking usurious interest is exclusive.**"

In the case at Bar, the Court of Appeals of Georgia held as follows, which we cite as authority and also as absolutely following the principles laid down in the cases cited:

"The Acts of Congress providing for the creation and operation of National Banks, as construed by the Federal Courts, constitute the ultimate and paramount authority on the subject. Hansford vs. National Bank of Tifton, 10 Ga. App., 270; Farmers National Bank vs. Dearing, 91 U. S., 29; Bates vs. First National Bank of Dalton, 111 Ga., 757; First National Bank of Dalton vs. McEntire; 112 Ga., 232; Reese vs. Colquitt National Bank, 12 Ga. App., 472. In Haseltine vs. Bank, 183 U. S., 134, the Supreme Court of the United States has said: "The definition of usury, and the penalties fixed thereto, must be determined by the National Banking Act, and not by the laws of the State."

So the State laws can not control on the subject of usury.

III.

UNDER THE NATIONAL BANK ACT, NOT ONLY BY ITS EXPRESS LANGUAGE, BUT ALSO AS CONSTRUED BY THE UNITED STATES COURTS, NATIONAL BANKS ARE PERMITTED TO TAKE DISCOUNT AT THE HIGHEST LEGAL RATE AUTHORIZED BY THE LAWS OF THE STATE IN WHICH SUCH BANK DOES BUSINESS, AND THUS IN GEORGIA DISCOUNTING AT 8% DOES NOT CONSTITUTE USURY, ALTHOUGH, IF DONE BY A STATE BANK IN GEORGIA, IT WOULD BE USURIOUS.

We wish to call to the attention of the Court that under the very language of **Section 5197** of the Revised Statutes of the United States discount, which is necessarily taken out in advance, is permitted at the highest rate allowed by the laws of the State; it reads as follows: **Any** (National Banking) **Association may take, receive, reserve and charge on any loan or discount made, or upon any note, bill of exchange or other evidences of debt, interest at the rate allowed by the laws of the State, territory or district where the Bank is located and no more.**

It will be further observed that, under the language of the seventh paragraph of section **5136 R. S. U. S.** giving the powers of a National Bank, **discounting** is included.

We propose to show by the authorities that discount means necessarily charging interest in advance and, this power being expressly conferred as stated upon National Banks, it necessarily follows that a National Bank can charge in advance the highest rate of interest allowed by the law of the State in which it is located, being in this case 8 per cent., which is allowed by the laws of Georgia by contract in writing.

In the case of **Farmers National Bank vs. Dearing, 91 U. S., p. 29,** the Court dissects Sections 5197-5198 on page **32,** and among the points of the dissection is the following: **(4) "Such interest may be reserved, or taken in advance."** This decision was not really necessary, because the Statute itself, which constitutes a part of the charter of the National Banks, that is Section **5136,** as quoted above, and Section **5197** expressly recognize that a National Bank may charge interest on any **loan** or **discount.** But, in an early case in the United States Supreme Court, **Fleckner vs. Bank of United States, 8th Wheaton, p. 338,** the Court held in its head-note this: **"Discounting from the sum due on a note the amount of the interest at the rate of six (6%) per cent., for the residue of the time the note has to run is not usurious."**

On page **351,** the Court says: **"Nothing can be clearer than that by the language of the commercial world, and the settled practice of banks, a discount by a bank means, ex vi termini, a deduction or drawback made upon its advances or loans of money, upon negotiable paper, or other evidences of debt, payable at a future day, which are transferred to the bank."**

And on page **354** the Court expands upon these announcements, and states that an authority to **discount** or **make discounts** from the very force of the terms necessarily includes an authority **to take interest in advance. "And this is not only a settled opinion among professional and commercial men, but stands approved by the soundest principles of legal construction. Indeed, we do not know in what other sense the word discount is to be interpreted. Even in England, where no statute authorises bankers to make discounts, it has been solemnly adjudged that the taking of interest in advance by bankers, upon loans in the ordinary course of business, is not usurious."** This decision was rendered by the famous **Judge Story.**

It is a leading case and has been many time followed by the Supreme Court of the United States. This case has been cited by the Supreme Court of Georgia to show that principle such practice should be allowed to prevail."

Union Savings Bank vs. Dottenheim, 107 Ga., 606, 614, which says:

"It is also well settled that a contract providing for the payment of the highest lawful rate of interest in advance is not usurious; though many of the Courts which recognize this as an established rule express doubts as to whether upon principle such practice should be allowed to previal."

And the Court supports this doctrine by a dozen or more citations of authorities, among which are a number cited on this brief, including the Fleckner case. And in addition thereto the Court cites the case of **Fowler vs. Trust Company, 141 U. S., p. 384,** and the range of cases covers **Indiana, New York, Virginia, Kansas, Massachusetts and Vermont.**

This case has been reversed as to the usurious feature because the State of Georgia prohibits a charge of the highest legal rate by discount, but it has not been reversed as to what is well settled and the general rule prevailing as to discounts.

In the lower Court the counsel for the petitioner undertook to say that the decision in the Fleckner case has not been generally recognized as authority for the legality of the practice of taking interest in advance and in his comment on that case in the lower Court he said that the Supreme Court of the United States "was dealing with the general question, which has received a different construction in Georgia."

As we will show below, the Supreme Court of Georgia has not given a different construction to the general law but simply to the special statute in Georgia, but we cite the following to show that the Fleckner case has been recognized as authority in many cases.

In **Danforth, et al. vs. National State Bank of Elizabeth, decided in the Circuit Court of Appeals, of the Third Circuit, 1891,** that Court, on page 273, 48 Fed. Rep., refers to the case of **Fleckner vs. The Bank,** and says that Judge Story held "**nothing can be clearer than that by the language of the Commercial World, and the settled practice of banks, a discount by a bank means ex vi termini, a deduction or draw-back, made upon its advances or loans of money upon negotiable paper or other evidences of debt, payable at a future day, which are transferred to the bank,**" and it was added that if the transaction there was a purchase, it was "**a purchase by way of discount.**"

In Morris vs. Third National Bank of Springfield, 142 Fed. Reporter, page 25 the Court of Appeals of the Eighth Circuit, in 1905, decided that the power to discount promissory notes, and other evidences of debt, expressly given to National Banks by Revised Statutes, **5136,** is sufficiently comprehensive to include the purchase of notes at less than their face value, and in this case **certiorari** was **denied by the Supreme Court in 201st U. S., 649.**

In that case, on page 31, the Court holds that the discounting of promissory notes, and other evidences of debt, is within the express granted power of National Banks (Revised Statutes **5136),** and that term is sufficiently comprehensive to include the acquisition both by way of purchase, and by way of ordinary loan **(Bank vs. Johnson, 104 U. S., 271; Fleckner vs. Bank, 8th Wheaton, 338; Danforth vs. Bank, 48 Fed. 271; Bank vs. Savery, 82 N. Y. 291; Pape vs. Bank, 20th Kansas, 440).**

In **National Bank vs. Johnson, 104 U. S., 276.** decided in 1881, the court says "in **Fleckner vs. Bank of the U. S., 8th Wheaton, 338,** Mr. Justice Story said, quoting his words as set out aforegoing; and on **page 277,** the Court holds that specific power is given to National Banks, Revised Statutes **5136, "to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt";** the Court stating **"so that the discount of negotiable paper is a form according to which they are authorized to make their loans, and the terms 'loans' and 'discounts' are synonyms,"** and further on the Court holds that discounting paper, as understood in the business of banking, is only a mode of loaning money, **"with the right to take the interest allowed by law in advance."**

This case of Fleckner vs. Bank of the United States, so far as it decided that taking interest in advance by bankers upon loans in the course of ordinary business, is not usurious, is cited and that rule applied in the following cases:

Bank vs. Cook, 60 Ark., 293, 29th L. R. A., 761.
McGill vs. Ware, 4th Scam., 26, where the highest legal rate was taken in advance.

Vahlberg vs. Keaton, 51 Ark., 541, 4th L. R. A., 462.
Hass vs. Flint, 8th Blackford, 67.
English vs. Smock, 34 Ind., 116.

Tholen vs. Duffy. 7th Kansas, 409, cited in the note **29 L. R. A.,** ..., in which last named case, itwas said **"in cases where note or bill is given, it is supported by such an overwhelming current of decisions, and is a matter of such universal practice, that it may well be considered as engrafted upon the law as a settled rule,"** and in this case, it was held, that it was lawful to take interest in advance on note and mortgage given for one year.

Newell vs. National Bank, 12 Bush. (Ky.), 60.
Duncan vs. Maryland Sav. Inst., 10 Gill & J., 311.
Lyons vs. State Bank, 1st Stew., 469.

It will be noted all loans in this case are less than five months.

Bank of Utica vs. Wagner, 2nd Cow., 767. Savage, Chief Justice, rendered the opinion, and on page 767, quotes **Fleckner vs. Bank of U. S., 8th Wheaton, 338,** and states that Judge Story, in giving the opinion of the Court **(8th Wheaton, 354)**, observes the **authority to make discounts (as in R. S. 5136), means an authority to receive the interest in advance;** the same doctrine, says the Court, has been recognized in **Pennsylvania** and in **Massachusetts.**

Stribbling vs. The Bank, 5th Rand., 144.
Grigsby vs. Waver, 5th Leigh, 213.
Planters Bank vs. Snodgrass, 4th Howard (Miss.), 627.

Bank of Geneva vs. Howlett, 4th Wend, 332, cited in the note to the **Bank vs. Cook, 29th L. R. A.,** so that we assert that the case of **Fleckner against the Bank** has been cited, approved and followed in the foregoing, amongst other cases, and we can state that it is generally recognized as authority for the legality of the practice.

Further counsel for petitioner said that our own Court, in 107 Ga., page 614, in reference to deducting interest at the highest rate in advance, says **"Though many of the Courts which recognize this as an established rule, express doubts as to whether upon principle such practice should be allowed to prevail."** Instead of citing the whole of this sentence of our Court, as we did as follows: **"It is also well settled that a contract providing for the payment of the highest lawful rate of interest in advance is not usurious,**

though many of the Courts which recognize this as an established rule, express doubts as to whether upon principle, such practice should be allowed to prevail." They quote the last half only, and then cite the case of **Fleckner vs. The Bank, 8th Wheaton, 338,** as supporting this doubt.

The case of Fleckner vs. The Bank, does not express any doubt. The case 107 Ga., 614, cited the **Bank of New Port vs. Cook, 29 L. R. A., 761; Insurance Company vs. Sturges, 2nd Cow.. 664; Fleckner vs. Bank of the U. S., 8th Wheaton, 338; Tholen vs. Duffy, 7th Kansas, 405; Fowler vs. Trust Company, 141 U. S., 384,** in not one of which is there any "doubt" expressed "as to whether upon principle such practice should be allowed to prevail." It may be that in some one of the other cases cited by the Supreme Court there may be a doubt. Certainly there is no such doubt in **Bank vs. Bissell, 12 Pick., 586,** because that case, in the conclusion thereof, says "**Upon the other point, that taking the interest in advance is usurious, we think it too well settled by a series of decisions, both in this and other states, to be now questioned that such practice is not a violation of the statute, and does not render the contract usurious.**" Nor was any doubt expressed in the case of the **Maine Bank vs. Butts, 9th Mass., 49,** as we have that authority before us, and find none such.

WHY THEN DOES THE PETITIONER VENTURE TO CLAIM THAT THE DECISION IN 8TH WHEATON "**HAS NOT BEEN GENERALLY RECOGNIZED AS AUTHORITY FOR THE LEGALITY OF THE PRACTICE.**" HE DOES NOT CITE A SINGLE CASE WHERE THE CASE OF FLECKNER VS. THE BANK HAS BEEN REVIEWED AND REVERSED, OR WHERE IT HAS BEEN AT ALL CRITICIZED, AS AGAINST ALL THE ARRAY OF AUTHORITIES CITED BY US ABOVE APPROVING AND FOLLOWING IT.

The Supreme Court of the United States has recently held, that the charging of interest in advance by way of discount is the usual method of banks doing business, as follows:

"Banks may make ordinary loans and charge interest to be collected at the maturity of the note. But, as they usually reserve and deduct it in advance by way of discount, the Statute is framed so as to apply to cases where the interest is paid by the debtor as well as to those in which it is reserved by the bank."

McCarthy vs. First National Bank, 223 U. S., 493, 499.

A case, which expressly decides the point involved in the case at bar, is found in

Baker et al. vs. Lynchburg National Bank, 91 S. E., 157,

decided by the Supreme Court of Appeals of Virginia on January 11th, 1917.

That case involved a suit for penalty for usury and the point was expressly made that discount retained or reserved by the bank on its loans was usurious.

The statute under discussion in the case at bar was directly involved and the Court held as follows:

"None of these payments (of interest) included a greater rate of interest than one-half of one per cent. for 30 days on the face of such renewal notes. This rate the bank had the legal right to charge and receive in advance under Section 5197, R. S. U. S. (U. S. Comp. St. 1913, Section 9758.)"

The highest legal rate of interest in Virginia was 6 per cent., therefore as the rate charged was one-half of one per cent. for 30 days that was 6 per cent. per annum and the Supreme Court of Appeals of Virginia expressly held that the bank had the legal right to charge and receive this **in advance under Section 5197 of the R. S.** In other words, the Court was not deciding whether or not the Statute of Virginia authorized the 6 per cent. interest to be charged in advance, but specifically held that interest at the highest rate allowed by the laws of the State was properly charged and received in advance under the laws of the United States.

In the **29th volume of L. R. A., p. 761,** in the case of the **Bank of Newport vs. Cook** (Arkansas), it is held (see headnote 2nd), that taking interest in advance on a negotiable note at the highest rate allowed by the Constitution is not usury. And there is an elaborate note to this decision, in which decisions are collected from a number of States supporting this proposition.

Among these States are **Vermont, Kansas, Arkansas, New York, Alabama, Massachusetts, Michigan, Cranch Circuit Court Reports of the United States, Illinois, Virginia, Texas, Connecticut, Nebraska,** and likewise so decided in **England.**

Among these cases we find that in one of the Alabama cases, it is held that charter authority to take interest at a certain rate is held to be equivalent to authority to discount at that rate, and to permit taking of interest in advance. And, again, we find in **4th L. R. A., 464,** that the Supreme Court of **Arkansas** holds, referring to 12th Statute of Anne, that the American States have followed English Statutes as a model, and the American Courts have adopted the construction given it by the English Courts. Consequently, the Court finds **"that the Courts uniformly hold at the present day that the interest for ordinary paper, having usual time to run, such as is the custom of banks,**

may be taken in advance by way of discount and not subject the paper to the taint of usury." Quoting 8th Wheaton. p. 354, and a number of other cases, and text books.

In the National Bank vs. Johnson, 104 U. S., 271, 277, the Court, after quoting fully Fleckner vs. The Bank of the United States, 8th Wheaton, p. 338, proceeds to enlarge upon the term discount, and holds that this power of discounting is given to National Banks by Section 5136. And the Court says, on page 277, that the discount of negotiable paper is the form according to which they are authorized to make their loans, "and the terms, loans and discounts are synonyms." And further the Court says that whether loans or discounts are identical in the sense of Section 5197 is quite immaterial, for both are expressly made subject to the same rate of interest.

That case is also authority for the proposition that to discount paper, as understood in the business of banking, is only a mode of loaning money with the right to take the interest allowed by law in advance.

In Earnett vs. The National Bank. heretofore cited, 98th U. S., p. 558, the Court holds, referring to the two States where the commercial paper operated, as follows:

"The Statutes of Ohio and Indiana upon the subject of usury may be laid out of view. They can not affect the case."

"Where a Statute creates a new right of offense and provides a specific remedy or punishment it alone applies." Such provisions are exclusive, quoting 91 U. S., p. 29.

In the case of Morris vs. Third National Bank of Springfield, Mass., 142 Fed. Rep., p. 25, 31 (already cited), it was held by the Circuit Court of Appeals, 8th Circuit that a dis-

tinction is held in some of the State usury laws between a purchase and discount of commercial paper. But the Court holds that no such distinction can be made, and states "**the discounting of promissory notes and other evidence of debt is within the express granted powers of National Banks.**" **Revised Statutes U. S., Sec. 5136.** And the Court further holds that that term is sufficiently comprehensive to include the acquisition both by way of purchase and by ordinary loan, quoting **104 U. S., p. 271,** and a number of other cases including **8th Wheaton, 338. Certiorari denied 201 U. S., 649.**

We take it, therefore, that it makes no difference whether the discount is in the way of purchase of notes, or in the way of purchase by way of discount, or in discounting notes or loans. The effect is the same.

"**Banks are within the usury laws; but discounting interest for the whole time of the loan from its amount is not usury.**" (Headnote.)

"**The taking of interest in advance upon the discount of notes in the usual course of business by a bank is not usury. This doctrine has been long settled and is not now open for controversy.**"

Thornton vs. Bank of Washington, 3 Peters, 36.

"**When a statute fixes the rate of interest per annum, it has always been held that parties may lawfully contract for the payment of that rate, before the principal debt becomes due, at periods shorter than a year.**"

Myer vs. City of Muscatine, 1 Wallace, 384.

In considering this statute we must also consider the conclusion of it, which reads as follows:

"But the purchase, discount or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest."

This necessarily implies that this interest can be taken in advance and this is confirmed by the following decision, which says:

"The Bank had by the express words of the statute, the right to charge and receive the current rate of exchange for sight drafts, in addition to interest at the rate of six per cent. per annum, which is the rate fixed by general statute in the State of Pennsylvania."

Wheeler vs. The Union National Bank of Pittsburg, 96 U. S., 268.

So, that it is perfectly clear that by the express powers given to National Banks, we may say, in their charter they are permitted to make discounts at the rate, say in Georgia, of eight (8%) per cent., per annum, by agreement, and this is not usury. The reason why it is usury under the State law, and when done by a State Bank is because the Statutes of Georgia make discount one of the modes of effecting usury. And the case of the **Loganville Banking Company vs. Forrester, 143 Ga., p. 302**, which is the last exposition of this law of usury under the decisions in Georgia especially on page **305**, states that the reference in the Statute to the count and exchange excludes the custom of banks in making these charges additional to interest in the form of premium etc.

In this last named case on pages **304** and **305**, the Court refers to a rule of law, to the effect that interest might be

taken in advance on short time paper, without rendering the transaction usurious, and states "this rule of law is said to have arisen out of the custom and practice of banks." And the Court also says: "The rules and practices of banks in this regard were extended to transactions between individuals and to paper not negotiated at a bank. The extension of the custom of banks to individuals is not allowable on any proper basis of logic, and is defensible only on the principle of uniformity. In this connection it may be well to notice that our statute applies the laws of interest and usury as affecting individuals to banks, and this affords strong ground for the conclusion that banks can not engraft on the law any usage or custom of banks variant with the law of usury. Perhaps a majority of the American Courts are in line with the English decisions, and extend to individuals the same privilege of discount, as affecting the interest demanded in advance, as is allowed by the usage of banks. **But our statute expressly forbids an increase of the maximum interest rate by way of discount; and usage can not override a positive enactment of law.** In some jurisdictions statutes prohibit banks from taking any greater rate of interest or discount on any note or draft or other security than a prescribed rate, but provide that such interest or discount may be calculated and taken according to established rules of banking. In such cases it is held that the statute permits the taking of interest in advance upon loans made by a bank according to the established rules of banking."

And further on, on page **305,** after quoting Section of the Georgia Code, on the subject of discount, exchange, etc., the Court says:

"The reference to discount and exchange excludes the custom of banks in making these charges additional to interest in the loan of money. The exclusion does not except short loans, and to make such an exception would be to

amend and change the statute, which Courts are powerless to do.''

As seen above, the Georgia law forbids ''an increase of maximum rate by way of **discount,**'' the Court thus recognizes **discount** as taking interest in advance.

In the case at bar, discussing the Loganville Bank case, the Court of Appeals of Georgia says:

''In the case of Loganville Banking Co. vs. Forrester, 143 Ga. 302, the Supreme Court of this State holds that ''the reserving of interest in advance by a bank at the highest legal rate of interest on a loan, whether it be a short or long-term loan, is usurious.'' We might formulate and state the contentions of the plaintiff as follows: For a national bank to receive on any loan or discount more than the rate of interest allowed by the law of the State where it is located is a usurious transaction; in Georgia eight per cent. interest in advance by way of discount is by the State law usurious; therefore for a national bank in Georgia to receive eight per cent. in advance by way of discount is usurious. The contention of plaintiff is sustained by the authority of the case of Timberlake vs. First National Bank, decided by the Circuit Court, N. D. Mississippi, 43 Fed. Rep. 231 (3), where it was held: ''Under Code Miss. 1880, which only allows interest on the amount of money actually lent, a national bank in that State can not deduct interest in advance.'' The ruling made in the Loganville Banking Co. case is based upon the provisions of the Georgia statute against usury, which ''expressly forbids an increase of the maximum interest rate by way of discount,'' and in that case it is stated that ''All laws respecting the rate of interest charged for the loan of money by individuals are applicable to banks,'' citing Civil Code (1910), Par. 2336. Therefore the question with which we are now concerned is whether, under the authority of the national bank act

as interpreted by the Federal decisions, a national bank can charge the highest rate allowed under the State law by way of discount in advance, although State banks are prohibited from so doing. Counsel for the defendant contend that they may, for the reason that while the State law specifically prohibits State banks over which it has control from thus exceeding the maximum rate by way of discount (which prohibition constitutes the basis of the decision in the Loganville Banking Co. case), the national bank act (paragraphs 5197, 5136 (7), supra), on the contrary, expressly allows and permits national banks to charge the highest rate allowed under the State law by way of discount, the meaning of such authorized power to discount necessarily being to take out and reserve such interest in advance. * * *

Thus, the act of Congress relating to the operation of national banks might have authorized them to charge a rate of interest in excess of that allowed under the State law, it might have restricted the power to discount under that rate to the right existing under the laws of the State where located; or it might have conferred such power to discount under the authorized State rate, irrespective of any such authority under the State law. It was within the scope of the authority of Congress to prescribe as the penalty for usury upon national banks that which is provided under the law of the several States; or it might, as was in fact done, provide a separate and exclusive penalty, which in fact happens to be double in amount and in severity to that imposed under the law of this State. It was the opinion of the eminent trial judge who sustained the demurrer in the present case, that the act of Congress did not adopt the State law upon the question of usury further than it relates to the rate of interest allowed by the laws of the States. In this opinion we agree. It does not appear that the Federal statute prohibits, as does the Georgia law, the discount of paper at the highest contractual rate; but on

the contrary it seems to specifically authorize any national bank to "reserve * * * on any * * * discount made * * * interest at the rate allowed by the laws of the State * * * where the bank is located." (Revised Statutes, Par. 5197, supra). It will also be observed that, under the language of the seventh paragraph of section 5136, R. S. U. S., defining the powers of a national bank, discounting is specifically included. That the import of the word "discount" necessarily carries with it the charging of interest in advance is shown by what was said by the Supreme Court of the United States in the case of Fleckner vs. Bank of United States, 21 U. S. (8 Wheat.) 338, 351, where Judge Story, speaking for the Court says: "Nothing can be clearer than that by the language of the commercial world, and the settled practice of banks, a discount by a bank means, ex vi termini, a deduction or drawback made upon its advances or loans of money, upon negotiable paper, or other evidence of debt, payable at a future day, which are transferred to the bank." See also the recent case of McCarthy vs. First National Bank, 223 U. S. 493, 499. A distinction has sometimes been held to exist between a direct loan and a purchase and discount of commercial paper, but in the case of Morris vs. Third National Bank, 142 Fed. 25, 31, it was held by the Circuit Court of Appeals that no such distinction can be made; and it is there said that "the discounting of promissory notes and other evidence of debt is within the express granted powers of National Banks." Rev. Stat. U. S. Par. 5136.

And the Court further holds that that term is sufficiently comprehensive to include the acquisition both by way of purchase and by ordinary loan; quoting National Bank vs. Johnson, 104 U. S., 271, in which latter case it was said that "the terms, loans, and discounts, are synonyms." The Fleckner decision also holds that the taking of interest in advance in the ordinary course of business does not constitute usury. Thus the Court says (21 U. S. 354) that an

authority to discount or make discounts, from the very force of the terms, necessarily includes an authority to take interest in advance. "And this is not only a settled opinion among professional and commercial men, but stands approved by the soundest principles of legal construction. Indeed, we do not know in what other sense the word discount is to be interpreted. Even in England, where no statute authorizes bankers to make discounts, it has been solemnly adjudged that the taking of interest in advance by bankers, upon loans in the ordinary course of business, is not usurious." The Fleckner case has been followed in many decisions rendered by the various judicatories of the country, State and Federal; and it must be regarded as well established that, in the absence of any statute to the contrary, similar to that of force in this State, interest may be taken in advance by way of discount, at least on short-time paper, at the highest rate allowed by law. See Bank of Newport vs. Cook, 60 Ark. 288, as reported in 29 L. R. A. 761, with note. Thus, while in the able opinion of our Supreme Court, as rendered by Presiding Justice Evans, it was held as the law of this State, and, as we think, manifestly correctly, that under the Georgia statute discount taken at the highest rate is prohibited as being usurious, the ruling made in that case would not apply to the powers of a national bank operating under Federal law which does not thus prohibit the taking of such discount, but on the contrary, expressly authorizes same which practice, as thus authorized, has been declared by the Supreme Court of the United States not to be usurious. It is true that the Fleckner decision was rendered long prior to the enactment of the present national bank act; but the point is that this act as now of force authorizes **discount** at the highest rate allowed under the laws of the several States, and the ruling in the Fleckner case holds that such practice is not usurious. As regards the operation of national banks within the State of Georgia, Congress adopted the rate of interest as here prescribed, but went no further, and not only did not adopt our inhi-

bition upon discounting at that rate, but, on the contrary, gave specific authority therefor which practice, in the absence of any such inhibition, has been held by the Supreme Court of the United States not to be usurious."

In other words, under the Georgia law of usury, "**discount**" is put in the Statute as being prohibited as being usury, whereas under the law of the United States the power to discount notes is expressly given, and the penalty is also prescribed. So, if a National Bank in Georgia discounts a note by agreement at eight (8%) per cent. interest, it is lawful for it to do so, whereas if the same thing was done by a State Bank it would be unlawful.

The learned counsel for petitioner make much of the fact that National Banks of Georgia may thus gain a slight advantage by taking discount, that is, interest in advance, when the State Banks can not do so, and contends that it is inequitable and contrary to the intention of Congress that this should be done.

We can see nothing inequitable in this as an original proposition for there are several differences betwen State banks and national banks.

One variance between Section **5197** and the State law is as to **exchange**. Section **5197** states that the taking of **exchange** in addition to interest is not usury.

Wheeler vs. Union National Bank, 96 U. S., p. 268.

This would be usury under State law.

Logansville case, supra.

Another difference between the statute of the State and the statute of the United States is that under the law of

Georgia as it now stands the penalty for usury (Acts of 1916, page 48) is the forfeiture of the entire interest charged or taken and no further penalty or forfeiture than the entire interest shall be suffered or allowed.

Under Section 5198, if the usurious interest is paid, the penalty for usury is **double the entire interest** so that it is not inequitable that there should be the slight difference between the State banks and national banks occasioned by the specific provision of the laws of the United States allowing interest to be taken in advance.

But the Supreme Court of the United States has expressly held against the contentions of the learned counsel for the petitioner in this regard.

In Tiffany vs. National Bank of Missouri, 18 Wall., 409, this Court held:

"National Banks have been national favorites." Further, "it could not have been intended, therefore, to expose them to the hazard of unfriendly legislation by the States or to ruinous competition with State banks." Referring to the 30th section of the Act of June 3, 1864 (Sec. 5197, R. S. U. S.), and after having said that much has been done to insure National Banks "taking the place of State Banks," the Court says, "It allows such banks to charge such interest as State Banks may charge, and more, if by the laws of the State more may be charged by natural persons."

Therefore, we think that the judgment of the three courts that have already passed on this point, to-wit, the Superior Court of Chatham County, the Court of Appeals of Georgia, and the Supreme Court of Georgia, that a National Bank in Georgia has a right to charge 8% in advance though that right is denied to State Banks, should not be set aside and the writ of certiorari should be denied.

IV.

THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED ON THE ONLY FEDERAL QUESTION INVELVED IN THIS CASE.

At the end of the brief (page 15) appended to the petition for certiorari, it is submitted that the Court of Appeals of Georgia has committed error in three respects named, which should be corrected by this Court for the dismissal of the suit means:

1. That a petition setting forth excessive charges of interest, which was paid the lending bank by the borrowing bank, did not authorize a recovery of the penalty denounced by Congress.

2. It has held that these loans which were made at eight per cent. in advance, while usurious under the Georgia statute, were not usurious because practiced by a National Bank.

3. It has held that enforcing a deposit of over $10,000.00 as a condition of the loans, as part of a scheme to knowingly charge usury, does not entitle the representative of the borrower to the penalty unless the borrower paid interest as such on the enforced deposit, although the borrower did pay the full amount of interest charged on the full face of the loan contract.

The Court of Appeals clearly holds that, if the petitioner had set forth a case of usury as specified under his first and third propositions, he would have been entitled to recover.

It held that he was not entitled to recover under his second proposition.

There is no part of the first and third propositions that in any way involves the construction of the Acts of Congress set forth in Section 5197.

The Court clearly held that if petitioner had made out a case he was entitled to recovery under Section 5198, but, in order to recover under Section 5198, a case must be made out under Section 5197.

In other words Section 5198 merely denounces the penalty for the violation of Section 5197.

In order to recover petitioner must show a violation of Section 5197, therefore the only Federal question involved in this case is the right of a National Bank under the National Banking Act to charge 8 per cent. in advance.

We have shown, we think, in the foregoing portion of this brief that National Banks undoubtedly have such a right and this question has long been settled as has been shown above by the settled practice of the commercial world and the decisions of the Court of last resort in the United States, including Supreme Court of United States as well as courts of England.

We respectfully insist that this application for certiorari can not submit to this Court the decision of the Court of Appeals of Georgia, for the correction of any errors in the judgment of said Court of Appeals, but that it is incumbent on the petitioner for certiorari to ask that the writ be granted upon certain well established grounds.

However important the case may be to the applicant, it is clear that the question involved is not one of gravity, and general importance.

There is no conflict between the decision of the Court of Appeals, and of Federal Courts.

There is nothing affecting the relations of this nation to foreign nations, and indeed no matter of general interest to the public.

Fields vs. U. S. 205, U. S. p. 292.
U. S. vs. Rimer, 220 U. S., 547.

In the case of Forsyth vs. Hammond, 166 U. S., 506, the writ of certiorari to merit the approval of this Court had to involve questions of public and national importance, and on page 514, the Court says it has been chary of action in respect to certioraries, and that it will grant the same only when questions of gravity and national importance are presented.

The applicant has already had his day in Court by applying to the Supreme Court of Georgia for a writ of certiorari, and has been denied.

The Supreme Court of Georgia, in the case of Central of Georgia Ry. Co. vs. Yesbik, 146 Ga., page 620, had already carefully considered this question, and determined to follow the rule of the Supreme Court of the United States, as to the granting of the writ, to-wit: That the writ should be exercised sparingly, and with great caution, and be granted only in cases of peculiar gravity, or of grave importance. The Supreme Court of Georgia denied the writ because it saw that this case had in it no element of importance, or peculiar gravity, or of novelty. It was simply a suit to recover a penalty, to-wit: double the amount of interest paid The National Bank of Savannah, under two sections of the Revised Statutes, and was of the character of litigation, which has several times been before that Court, and the Court of Appeals, concerning these sections of the Revised Statutes.

The decision of the Court of Appeals cites Revised Statutes 5197, as permitting discount, or taking of interest

in advance, and also cites Section 5198, which gives the right to sue for twice the amount of interest actually paid, and also cites Section 5136 as including among the powers of the banks, the discounting of notes. The decision of the Court of Appeals further showed that under the decision of the case of Loganville Banking Co. vs. Forrester, 143 Ga. 302, the Supreme Court of Georgia had held that the act of The National Bank of Savannah in charging interest in advance, would be usury, and the Court of Appeals sought to show that The National Bank can charge the highest rate of interest allowed by the State law, by way of discount in advance, although State Banks are prohibited from so doing, holding that the Acts of Congress providing for the creation and operation of National Banks, as construed by the Federal Courts constitute ultimate and paramount authority on the subject.

The Court of Appeals cited Hansford vs. The National Bank of Tifton, 10th Ga. Appeals 270 and 271. The National Bank of Savannah claimed in this case that it was authorized by section 5197 to deduct interest in advance, or discount paper, and this case, in the 10th Ga. App. held that where the power or liability of The National Bank is called into question, necessarily a Federal question is involved, and consequently United States Supreme Court is the ultimate and paramount authority on the subject, and all authorities of State courts to the contrary must yield. It also cited Reese vs. Colquitt National Bank, 12th Ga. App. 472, which holds that State statutes relating to usury, and prescribing penalties for charging or taking usury, have no application to negotiable instruments held by National Banks. The penalty fixed by Section 5198 of the Revised Statutes is exclusive. Said case further decides that a surety who signs a negotiable note held by a National Bank, containing a waiver of homestead and exemption, which is secretly tainted with usury, of which fact he had no knowledge at the time of signing, is not discharged from liability thereon by the

exaction of usury, as his risk had not been increased since the Georgia statute declaring a waiver of homestead and exemption to be void, when it was a part of the usurious contract, can not be applied when the creditor taking or charging the usury is a National Bank. In other words, it was held that if held by a State bank, it was usury, and the surety would be relieved. In case of a National Bank, it was different.

It also cited First National Bank of Dalton vs. McEntire, 112 Ga., 232, which held that the penalty imposed by Section 5198 is exclusive, and the law of this State that a waive. of homestead when part of a usurious contract is void, imposes a penalty for charging usury, and therefore, not applicable to National Banks. It follows that a surety who signs a promissory note containing a waiver of homestead, and secretly tainted with usury, of which latter fact he had no knowledge at the time of signing, is not discharged from liability when the note is payable to The National Bank, as his risk has not been increased, and on pages 233 to 235, it shows that a surety in a State Bank, under the circumstances, would be relieved, while a surety in a National Bank would not be relieved.

So the Supreme Court of Georgia has fully considered this question, and in response to the petition for certiorari filed by the applicant here, has followed the rule of the Supreme Court of the United States as to the granting of the writ, and holding that this case involved no peculiar gravity, and was not one of grave importance, that there was no element of importance, or gravity, or novelty in the decision, denied the certiorari. That is to say, the applicant here took a chance in applying to the Supreme Court of Georgia for a writ of certiorari, which Court, following the rule of the Supreme Court of the United States as to the granting of the writ, denied the same, and then the applicant applies to this Court, and simply sets up that the

Court of Appeals had committed some errors, which the Court ought to correct, and has failed to comply with the rules of this Court in that he has not showed that the case involves principles of great importance, of peculiar gravity, and novelty.

That no federal question was involved on anything except the right to charge 8% interest in advance is demonstrated by the significant fact that neither the Court of Appeals of Georgia, nor the learned counsel for petitioner cited or relied on any case in the Federal Courts on any point except the right to charge 8% in advance.

Under the settled principle and rulings of this Court, the writ of certiorari will not be granted on matters not involving grave federal questions and the writ should be denied in this case.

V.

THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED ON THE POINTS INVOLVED IN THIS CASE NOT INVOLVING FEDERAL QUESTIONS.

As shown by the summary of the points made by petitioner just recited, he claims three errors in the decision of the Court of Appeals of Georgia.

We have shown that only one of these involves a federal question.

His first point is made out by taking isolated instances and showing that the charges made by the National Bank exceeded 8 per cent. in advance.

We will show later on in this brief that this is merely a question of pleading under the laws of Georgia.

In other words, he has not pleaded usury as required by the laws of Georgia, and for that reason the Court of Appeals held that he could not recover on these isolated instances.

This is certainly not a federal question.

With reference to the third point, the point of special deposit, the Court of Appeals held that under the law as laid down by the Courts of the United States it was necessary before a recovery can be had in such a suit that the plaintiff should allege that the usury was paid.

This clearly does not involve a federal question.

The question of whether or not usurious interest has been paid is clearly a question of pleading so that there is no federal question involved in this case except the right to charge 8 per cent. in advance.

It has been universally held by this Court that, where the judgment of the Court below can stand upon any ground free from objection so far as federal rights are concerned, a writ of error from the Federal Supreme Court will not be sustained.

Waters Pierce Oil Co. vs. Texas, 212 U. S., 86

As we have shown, the Court is more reluctant to grant a writ of certiorari than a writ of error.

"Where the Supreme Court of a State decides a federal question in rendering a judgment and also decides against the plaintiff in error, upon an independent ground not involving a federal question and broad enough to maintain the judgment, the writ of error will be dismissed without considering the federal question."

Hammond vs. Johnston, 142 U. S., 73.
Hammond vs. Connecticut Co., 150 U. S., 633.
Hammond vs. Horton, 169 U. S., 734.

Moreover as regards all the interest except 8 per cent. in advance, and in regard to the special deposit, the Georgia Courts treated National Banks as being on footing with all other citizens of Georgia with reference to the State statutes.

The Supreme Court of United States has held that the true construction of State legislation is a matter of State jurisprudence and, while the right of National Banks springs from the Act of Congress, yet it is only a right to have an equal administration of the rules established by the State law.

It does not involve a reservation to the National Courts to determine adversely to the State Courts what is the rule as to interest prescribed by State law, but only to see that such rule is equally enforced in favor of National Banks.

"The decision here was not against any equality of right, but only a determination of the meaning of the State law as applied to creditors. It therefore denied no rights given by the Federal Statute and involved no judgment adverse to plaintiff as to its meaning and effect. It assumed that the plaintiff's interpretation of that statute was correct, and ruled nothing against it. It presents no Federal question. It is broad enough to cover this case. It was relied upon by the Supreme Court, and therefore the case is, by the settled law as heretofore announced, one which does not come within the jurisdiction of this Court."

Union National Bank vs. Louisville Railway Company, 163 U. S. 325.

Therefore, under the construction put on the pleadings in this case, the writ of certiorari should not be granted

because no federal question was involved except on the right to charge 8% in advance and there were State questions, to-wit, questions on pleadings, to warrant the judgment.

VI.

THE SPECIAL DEPOSIT INVOLVED IN THIS CASE, IF USURIOUS, DOES NOT WARRANT THE GRANTING OF THE WRIT OF CERTIORARI.

The Court of Appeals on this feature of the case decided in substance that, under the allegations of the petition, the deposit was usurious, but, as the allegations of the petition did not show that any usurious interest had been paid on it, petitioner could not recover.

The Court of Appeals says, "Referring to the petition in the present suit as amended, we find no allegation setting forth the amount of usury paid by plaintiff to defendant by reason of such required deposit."

Under the decisions of this Court, it is absolutely necessary that the amount of usurious interest paid should be alleged, in order to warrant a recovery under the provisions of Sec. 5198. See cases cited in opinion, also,

> Brown vs. Marion National Bank, 169 U. S., 416.
> McCarthy vs. First National Bank, 223 U. S., 493.

The Court of Appeals merely held that the petition did not show an allegation of any payment of usurious interest so far as the special deposit was concerned, and therefore the Court of Appeals of Georgia gave the construction to Section 5198 which has been given by the Supreme Court of United States and therefore no federal question is involved.

It is simply a question of pleading under the Georgia law.

In the Court below, the respondent contended that the special deposit was not usurious for the reasons stated in the following, being substantially excerpts from brief:

The petition sets up a second branch of the charge of alleged usury, in that it states that there was an understanding and agreement between The National Bank of Savannah and The Citizens & Screven County Bank, at the time of making the said loans, that The Citizens & Screven County Bank should, while it was a borrower, keep on deposit with The National Bank of Savannah at least the sum of $10,709.31, "which could only be used towards the payment of said indebtedness," and that The Citizens & Screven County Bank kept this deposit there, whereby it lost interest at seven (7%) per cent., being Fourteen Hundred and Ninety-nine dollars and Thirty Cents ($1,499.30).

We respectfully submit that this was no taking of interest in the way of usury. The taking of interest in the way of usury can only be effected when it is compulsory by the contract. In this case it was not compulsory, because this amount of Ten Thousand Seven Hundred and Nine Dollars and Thirty-one Cents ($10,709.31), could have been used towards the payment of the indebtedness, in which event the indebtedness could have been reduced that much, and the interest or discount at the rate of eight (8%) per cent. per annum, would to that extent have been paid, or saved.

This contract, as set out, meant that The Citizens & Screven County Bank should pay in to The National Bank of Savannah, at least that much money on account of the indebtedness, and if they did not pay it on account of the indebtedness, it should remain with the bank as security.

In other words, that bank, instead of paying this amount of money on the indebtedness, preferred to let it stand as a deposit, without interest, as security for its financial indebtedness to The National Bank.

There can be no case found in the books where usury results from a loss of interest, or the payment of more interest by the voluntary act of the debtor where the debtor had the clear right to have avoided its loss of interest, or the accrual to the creditor of any interest.

By the very language of the petition this deposit of $10,709.31 is either a special deposit, because it was put in only to be used towards the payment of said indebtedness, or a specific deposit, as it is sometimes termed in the books, or a deposit in the nature of a special deposit. That is, it was a deposit of a sum of money to be held by the bank only to be used in the payment of the indebtedness, which meant, of course, the principal of the indebtedness.

The Screven County Bank had a perfect right to apply this money to the payment of "said indebtedness," and it was the only common sense thing that bank could do, namely, to apply it on that indebtedness at once, and in this way reduce its indebtedness to The National Bank of Savannah. The attempt of the petitioner in this petition to allege a specific deposit, a sum put in to be paid for only one purpose, and then charge The National Bank of Savannah with interest on it, fails. The National Bank of Savannah can only be liable for interest on money when the money becomes its property, and when the money can be used for all the purposes of the bank; that is to be paid out generally, and not particularly for one purpose only. The word ONLY in said petition in this regard is very significant, and very compelling in the construcion of the petition.

And, again, in **American-English Enc. of Law, volume 3, page 824,** the law is laid down that the bank which receives

a deposit to apply to the payment of a designated debt can not escape liability by applying it to some other indebtedness. In the present case The National Bank of Savannah did not receive this deposit with the right to apply the same to the payment of any indebtedness but it received the deposit "which could only be used towards the payment of said indebtedness," which means, of course, could only be used by the Screven County Bank "towards the payment of said indebtedness."

The National Bank of Savannah did not have a banker's lien, giving it the right to apply this deposit to the extinguishing of the depositor's general indebtedness, because that grows out of the doctrine that the relationship between the bank and depositor is that of debtor and creditor, but the bank did have a right to hold on to this deposit and to see to it that the Screven County Bank did not use it in any way except as a payment on this indebtedness.

For these reasons the Supreme Court of the United States has held in the case of **Reynes vs. Dumont, 130 U. S., p. 355,** that a bank holding a deposit of securities or property to secure one particular debt can not hold the same to make good a general balance due by the customer, but only has the right to hold such special deposits for the particular debt which they were to secure.

In the decision of the Court of Appeals, which is here complained of, the 5th headnote (made by editors) is as follows:

"Banks and banking, 'deposit for a specified purpose.' A deposit for a specified purpose is one in the making of which a trust fund is constituted with respect of which a special duty as to its application is assumed by the bank."

Cooper et al vs. National Bank of Savannah, 94 S. E. Rep., page 612.

In other words, the special duty as to its application, assumed by the bank, was simply to hold the same until the Citizens & Screven County Bank applied it, and of course there would be no interest pending such action by the Citizens & Screven County Bank, and hence, of course, no usury charged or paid, under Section 5198. As to this deposit for a specified purpose, reference is hereby made to the original petition in this case, which is part of the record, and the Court will see by referring to it, that this sum of $10,709.31 **is not alleged to have been deducted from any loan made by The National Bank to the Citizens & Screven County Bank, and therefore, it is not a part of any loan,** but the Citizens & Screven County Bank simply deposited this $10,709.31 for a specified purpose, taking the same from its general funds.

This amount of money, therefore, is not to be considered on the question of usury, but simply is to be regarded as a deposit for the specified purpose, as to which The National Bank of Savannah assumed a trust relation, that is to say, to hold the same for the Citizens & Screven County Bank until it applied the same to the debt, and can in no wise be regarded as playing any part in the usury question.

The Court of Appeals did not follow our contention, and we state it merely to show that, whether under the decision of the Court of Appeals or under our contention, there can be no Federal question involved so far as the special deposit is concerned.

As held by the Court of Appeals, counsel has not plead the case in such a way as to warrant a recovery under Georgia law.

The Court of Appeals says in this regard:

"On the contrary the original averment setting forth the amount of such usurious payment has been stricken by

plaintiff, for the reason, as stated in the brief of its counsel, that 'The interest on that amount, while lost to the plaintiff, was not **paid** to the defendant.' In other words, the plaintiff can not recover, under the statute, for interest lost, but for **usury paid**; and while the requirement of the deposit, on the conditions named, was really in itself a usurious transaction, the plaintiff could not recover the penalty computed on that amount."

Surely the Court can not have erred in holding that counsel stated his own contentions correctly.

As we will show later herein, counsel has now changed his ground.

As we will show hereafter, this Court will follow the Georgia courts in the construction of its State statute on pleading.

Therefore, there is nothing in the special deposit to warrant the granting of the writ of certiorari.

VII.

THE USURY, ALLEGED IN THIS CASE, IS NOT SO PLEADED AS TO WARRANT A RECOVERY UNDER GEORGIA LAW.

Under the laws of Georgia both in a suit for usury and in a plea setting up usury, the usury must be pleaded with particularity.

This is set up by Section 5674 of the Code and also by several decisions of the Supreme Court of Georgia.

"A plea of usury should distinctly set out the usury, its amount, date and time."

Tillman vs. Morton, 65 Ga., 386.

"The plea of usury is one regulated by special legislation. Such a plea must be complete within itself, and set forth the sum upon which the usury was paid, or to be paid, the time when the contract was made, when payable, and the amount of usury agreed upon, taken or reserved."

Trammell vs. Woolfolk, 68 Ga., 628, h. n. 1.

"In looking into the record, we concur, with the Court below, that the evidence as to the usury was too indefinite and uncertain as to the amount on which the usury was reserved. the time for which it was reserved, and the rate per cent. charged, upon which a defense could legally rest. To say there was so much usury in amount reserved on a contract, is not sufficient. Amounts, dates, rate per cent. and the time of the maturing of said contracts, should be shown with such certainty as is required in such pleas by Section 3419 of the Code of 1868, so as to furnish the data to the Court and jury upon which to predicate their findings in such a case."

Laramore vs. Bank, 69 Ga., 722,

and the Court says this applies also to a suit to recover back usury paid.

"The purpose of this statute is to require the defense of usury to be so pleaded that the amount that is sought to be recovered or set off may be determined accurately from the allegations in the plea, without aid from extraneous sources. Any defect, therefore, in such a plea which would prevent the determination of the amount would be a defect in substance, and can be taken advantage of by a general demurrer in writing, or an oral motion to strike."

Burnett vs. Davis. 124 Ga., 541, 543.
Culver vs. Wood, 138 Ga., 60.

The following is also conclusive:

"A plea of usury must set forth the sum upon which it was paid or to be paid, the time when the contract was made, when payable, and the amount of usury agreed upon, taken, or reserved. A plea which fails to comply with the statute is fatally defective. Civil Code (1910), 5674; Burnett vs. Davis, 124 Ga., 541 (52 S. E., 927). A similar degree of specification is required where it is sought by an independent action to recover usury alleged to have been paid by a debtor to a creditor."

Lee vs. King, 142 Ga., 609, h. n. 1.

The suit of the plaintiffs for usury in this case is defective in the following particulars: The true basis of calculating maximum interest is 8 per cent. in advance on the amount of the loan, but the plaintiffs claim that the amount of usury is the difference between the amount actually charged and eight per cent. in advance not on the face of the note but on the amount of note after deducting the amount of interest reserved, therefore, the entire basis of usury is defective and the usurious amount is not correctly stated in any case; as we have seen in the decision in **124 Ga., 543,** this could be taken advantage of by general demurrer or motion to dismiss, but in the case at bar the point is made not only by general demurrer but by special demurrer. In the second ground of demurrer it is alleged **"that usury is not set forth with sufficient particularity."** At the end of third ground of demurrer it is alleged **"that the alleged schedule of usury is defective, in that it does not calculate interest on the face of the note but interest on the amount alleged to be actually loaned."**

The fourth ground of demurrer is that the allegations that the defendant knowingly, took, received and charged the said Citizens & Screven County Bank a rate of interest greater than is allowed by law are incorrect and insufficient in that the exhibit referred to does not show whether or not the amount charged is in excess of eight per cent. per annum in advance on the face of the note. A similar ground of demurrer was substantially repeated in the fifth ground of demurrer.

The seventh ground of demurrer again repeats this.

In other words, usury is not in any single item properly calculated and the amount of usury is not correctly stated in any transaction. Under these circumstances we think it clear that the demurrer should be sustained not only on the general ground, but on the special grounds stated, because the statute specifically requires the stating of **"the amount of usury agreed upon, taken, or reserved."**

Nor are the allegations with reference to the special deposit of $10,709.31 sufficiently specific under the provisions of the statute in this case as set forth in Section 5674 of the Code.

In other words, it is not shown how much usury, if any, resulted from the deposit in this case.

The mere allegation, that a transaction is a scheme and device to cover up and reserve more interest than allowed by law, to-wit: eight per cent. per annum, and therefore the whole transaction was usurious, is not sufficient under this statute.

A case which is exactly in point on this subject, has been decided by the Court of Appeals of Georgia, to-wit:

which was a case in which the defendant set up the plea of usury to a suit by the plaintiff, and the plea, after setting out certain features of the transaction in reference to a loan, continued, "the said transaction was a scheme and device to cover up and exact and reserve more interest than allowed by law, to-wit, 8 per cent. per annum, and therefore the whole trade aforesaid was null and void, and the said note and the bond for title are void."

The Court held "The defendant's answer to the suit was in effect a plea of usury, and was insufficient in law, and was properly stricken on demurrer, the answer not setting forth the elements required by section 5674 of the Civil Code of 1910."

We think this is absolutely controlling in the case at bar.

We will note hereinafter the effect of this statute with reference to the pleading of usury in Georgia on the amounts which petitioner alleged were taken by The National Bank of Savannah as interest in excess of 8 per cent. in advance, and also with reference to special deposit.

We call to the attention of this Court that the Court of Appeals of Georgia specifically held that the usury was not properly pleaded in this case. The Court of Appeals construed the petition to mean that so far as the special deposit was concerned that there was no allegation setting forth the amount of usury paid by plaintiff to defendant by reason of such required deposit. It held that "a cross action for the statute penalty against the bank for taking usurious interest can not be maintained where the plea of usury fails to give the amount of usurious interest paid."

Therefore, the Court of Appeals of Georgia and the Supreme Court of Georgia have both held in this case that the usury was not only not good statutory pleading under the law of the United States, but also not good under the law of Georgia.

The Supreme Court of United States will follow the State courts in the construction of their own statutes.

> "A construction of State statutes by the court of last resort of the State will be followed by this Court."
>
> Noble vs. Georgia, 168 U. S., 398.

See also

> Old Colony Trust Company vs. Omaha, 230 U. S. 100.

Pleading is certainly a matter of local law, therefore, there is nothing so pleaded by the plaintiff as to warrant a recovery of usury under the law of Georgia.

VIII.

CONTENTIONS OF THE PETITIONER.

In his petition, Counsel for the petitioner emphasizes the fact that he is entitled to recover in this case because in several instances the discount collected exceeded 8 per cent. in advance.

We have shown in the foregoing portion of this brief (under point VII.) that the petitioner has not pleaded usury under the Georgia law in such a way as to authorize a recovery.

In other words, he has in each case stated the usury at a larger amount than it could possibly have been because he has charged that all is usury that exceeds 8 per cent. interest on the amount actually loaned after deducting the discount.

Under the statutes, as construed by the courts of the State of Georgia, which we have shown this Court will follow, this does not afford the petitioner a ground for recovery.

In his brief in the Court of Appeals, counsel did not take the position that the special deposit made each of the loans usurious, but if we admit for the sake of argument that his brief did take that position, and even if we admit for the sake of argument that the special deposit is usurious, in neither event was the usury properly pleaded. As we have shown, the authorities already cited to the Court require that the plea of usury should distinctly set out the usury, its amount, date and time.

Nowhere is it specified how much usurious interest was charged over and above the 8 per cent. in advance on the face of any loan.

Nowhere is it charged how much usurious interest was charged on any loans because of the usurious deposit, so the usury was not pleaded properly under the Georgia law.

As will be seen from the statement of the case set out in the earlier portions of this brief, the point that these amounts of usury were not properly alleged is covered in the 6th and 7th grounds of the demurrer, the 2nd, 3rd, 4th and 5th grounds of demurrer also specifically dealt with this subject so that the point was made in the pleading.

Now, as will be seen by an inspection of the record, the case was dismissed on the demurrer and the dismissal of

the petition by the Superior Court of Chatham County was sustained by the Court of Appeals of Georgia and by the Supreme Court of Georgia.

When a case is dismissed on demurrer, the Court sustains THE ENTIRE DEMURRER UPON ALL THE GROUNDS, GENERAL AND SPECIAL.

This is well settled in Georgia, as will be seen from the following:

"Where a demurrer to a petition contained several grounds, some going to the merits and some special, and the Court sustained the demurrer and dismissed the petition, there is no presumption that the ruling was based on the special grounds of the demurrer rather than the general, but the judgment will be treated as sustaining the entire demurrer upon all grounds. Gunn vs. James, 120 Ga. 482 (48 S. E. 148); 1 Freeman on Judgments (4th ed.), Sec. 276-a; Carr vs. Trustee of Emory College, 32 Ga. 557; Dodson vs. Southern Railway Co., 137 Ga. 583 (73 S. E. 834); Moor vs. Farlinger, 138 Ga. 359 (75 S. E. 423)."

DeLoach vs. Georgia Co., 144 Ga. 678, h. n. 1.

Therefore, the judgment in this case sustained **all the grounds of special demurrer in the case.**

This alone is sufficient to authorize the dismissal of this case under the cases previously cited to this Court, to-wit:

Hammond vs. Johnson, 142 U. S. 73.

This Court will not interfere with the judgment of the Court on a Federal question when the judgment can be sustained on other grounds.

As the judgment in the case at bar can be sustained on the ground of defective pleading, which is a non-Federal question, this Court will not interfere.

The only case cited by the plaintiff in error, which is at all in point on the proposition that a National Bank has no right to charge in advance the highest rate allowed by the State law, is **Timberlake vs. First National Bank, 43 Federal Reporter, 231 (3).** We do not think that this case should control the case at bar in favor of the plaintiff at bar because:

First. It is a case only by a Circuit Court of the United States.

Second. It is directly in conflict with the decisions already cited, such as Fleckner vs. Bank, 8th Wheaton, 338; Dearing vs. Bank, 91 United States, 29.

That decision was rendered in the Circuit Court of Mississippi in 1890, and was not carried up. It appeared that the law of Mississippi was that 10 per cent. per annum could be charged, **if contracted for in writing,** which was not done in the Timberlake case for the whole period, and therefore, **there was usury.** The Court, on page 235, referring to the Code of Mississippi, states that the Code of 1880 only allowed interest on the amount of money actually loaned, and does not allow it retained in advance. The Court proceeds to say, "**as is provided in The National Bank law, where no rate of interest is fixed by the State statute,**" the judge makes the same mistake here as is made by counsel for plaintiff in error in the Court of Appeals. They contended in that court, in their reply brief, that Section 5197 allowed the bank to retain interest in advance, only in cases where the State law had not fixed the rate of interest, and that the language in the statute "**such interest may be reserved or taken in advance**" referred to the interest mentioned in the clause next pre-

ceding, that is to say, where the State law has not fixed the rate of interest, and counsel for the plaintiff in error, as well as Judge Hill, blundered, as is clearly shown by the case of Farmers National Bank vs. Dearing, 91 U. S., pages 32 and 33. There was no excuse for Judge Hill making this error, because he decided this case in 43 Fed. Rep. in 1890, while the Supreme Court had decided the case of Farmers National Bank against Dearing, in 1875. We submit, therefore, that this decision is no authority for the applicant, and need not be further discussed.

The Plaintiffs in error cite cases to show that the construction by the State Court of it's law is conclusive on the question that the rate allowed by the State statute does apply.

We respectfully submit that the question before the Court is a construction of the United States statute, and not of a State statute; all that is involved in the State statute is the naming of the rate of 8%, and the United States law authorizing a discount at that rate necessarily implies that the interest may be taken in advance, and we do not see that the construction of the State Supreme Court, that the statute of Georgia prohibits reserving interest in advance can in any way militate against the law of the United States, which allows reserving interest in advance by way of discount. These remarks apply to the case of **Citizens National Bank vs. Donnell, 195 U. S., 374,** where the only question was as to compounding interest under the law of Missouri, and not the construction of the United States statute.

We do not see anything in the case of **Daggs vs. Phoenix National Bank. 177 U. S., 549, 555,** to indicate that the Court intended to say that where the State law did not allow a charge in advance that it was not permissible by the United States law. The word "allow" simply referred to

the rate of interest, and does not prohibit the charging of it in advance. In that case the National Bank gained, as the Supreme Court of United States would not consent to National Bank getting less than a State bank.

We think that the decision of the Court of Appeals of Georgia in this case, affirmed by the Supreme Court of Georgia, which recognizes the supremacy of the United States Statutes, amply disposes of these cases, if authority on the subject is needed.

In the conclusion of his brief in the Court of Appeals, the learned counsel for petitioner says: "That we are entitled to have a jury pass upon the question, is the claim of the plaintiffs, who have prosecuted this writ of error to reverse a judgment that does not seem to have a single authority to support it."

We think we have shown by the mass of authorities cited in this brief that counsel's assertion was erroneous when made, but, whether erroneous then or not, it is certainly erroneous now, because we have our case supported by two very high authorities, to-wit, the Court of Appeals of Georgia, and the Supreme Court of Georgia.

The judgment of the Court below should be allowed to stand and the writ of certiorari should be denied.

In this connection we wish to call to the attention of the Court the following on page 15 of petitioner's brief:

"There is no question of practice involved. The sole question is, that under the facts as pleaded by the petitioner, the State Court has construed 5197, 5198 R. S. to mean that a National Bank can take more interest than is allowed by law, by charging a greater rate of discount than is allowed by that law."

We have conclusively shown that pleading is involved and was necessarily involved in the decision of the case and petitioner is wrong in his contention.

On bottom of page 13 and top of page 14 of his brief in this case the learned counsel for petitioner has much to say of the "absurd result that could be accomplished" by taking out interest in advance.

We do not think that the argument of counsel, which relates to the reasonableness of such a practice, can have any weight against the strict and absolute provisions of the laws of the United States as enacted by Congress.

Under the provisions of Section 5197 of the Revised Statutes where no rate of interest is prescribed by the law of the State where The National Bank does business, The National Bank has a right to charge 7 per cent. interest in advance, the wording being as follows: "Such interest may be taken in advance reckoning the days, from which note, bill, or other evidence of debt has to run." Therefore, we do not see that the argument of counsel can have any weight against the express provision of the law, which has been decided to be constitutional.

We think the Court may safely trust the reasonableness of the laws of Congress rather than to counsel, inasmuch as the statute expressly permits discount, which is taking interest in advance.

We submit, therefore, that The National Bank of Savannah gained this case in the trial court upon a demurrer, and it was carried to the Court of Appeals as an Appellate Court, and there the case was affirmed; it decided that The

National Bank of Savannah, in charging a discount of 8% in advance, had done what the law authorized it to do; that whether, under the State statute, this was permitted to be done, or not, was not the question.

That a writ of certiorari was sought from the State Supreme Court, the applicant alleging error in this holding, and the State Supreme Court after full consideration, denied the writ of certiorari.

The State Supreme Court, in conformity with its practice, as shown by the case of the Central of Georgia Ry. Co. against Yesbik, 146 Ga., 620, followed the rule of the Supreme Court of the United States, as to the granting of the writ, and denied the writ of certiorari.

The applicant now applies to the Supreme Court of the United States for writ of certiorari, which the State Supreme Court has refused, and alleges that the Court of Appeals of Georgia had committed several errors in the three respects named, at the conclusion of his brief, to-wit: pages 15 and 16.

We submit that it does not make any difference to the Supreme Court of the United States whether the Court of Appeals has committed any error in its decision or not.

Presumably its decision was in conformity with the laws of Georgia, satisfactory to it, and satisfactory to the Supreme Court of Georgia, and the Supreme Court of the United States will deny the writ because the applicant has in no wise conformed to its rules. It has not been shown to this Court

that the decision complained of involves anything of novelty, of gravity, or importance, to the people at large.

We therefore, submit that the certiorari should be denied, and we pray accordingly.

All of which is respectfully submitted.

WM. GARRARD,
EDWARD S. ELLIOTT,

Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918

Thomas J. Evans, Sole Surviving Receiver of the Citizens & Screven County Bank,
Petitioner,

vs.

The National Bank of Savannah,
Respondent.

No. 316 3846

ON REVIEW FROM THE COURT OF APPEALS OF GEORGIA, WRIT OF CERTIORARI HAVING BEEN GRANTED

BRIEF AND ARGUMENT OF COUNSEL FOR PETITIONER

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CASES CITED

STATUTES AND CODES CITED

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918

Thomas J. Evans, Sole Surviving Receiver of the Citizens & Screven County Bank,
Petitioner,
vs.
The National Bank of Savannah,
Respondent.
No. 916

ON REVIEW FROM THE COURT OF APPEALS OF GEORGIA, WRIT OF CERTIORARI HAVING BEEN GRANTED

BRIEF AND ARGUMENT OF COUNSEL FOR PETITIONER

SYLLABUS

A National Bank in the State of Georgia, can not lawfully charge by way of discount on loans, a rate of interest of eight per cent. per annum and more than that rate, by deducting the same in advance, nor can it as a condition of the loans made to the borrower, enforce a deposit of

$10,709.31, on an agreement that it can be used for no other purpose than to repay the said loans. And such bank is liable to the penalty of double the amount of all interest paid by the borrower to the lender.

STATEMENT OF THE CASE

The Citizens & Screven County Bank, of Screven County Georgia, by order of the Attorney General of Georgia, was placed in the hands of a receiver of the Superior Court of Screven County, said State, on November 22nd, 1915, and the petitioner, Evans, is the sole surviving receiver of said bank, and was duly authorized to file suit against the respondent to recover the penalty in this cause. (Record, page 3, Petition for Certiorari, page 4.)

Action was filed November 14, 1916, in the Superior Court of Chatham County, Georgia, and in the petition, as originally filed, the plaintiff sought to recover twice the amount of all the discounts actually paid to the National Bank of Savannah, AND ALSO TWICE SEVEN PER CENT., calculated by petitioner on an enforced deposit of $10,709.31, which was required to be kept on deposit on the condition that it be used solely for the purpose of repaying the loans, alleging that the use of that sum was worth seven per cent. to the National Bank and the same amount to the Citizens & Screven County Bank for the period of time it was maintained.

This allegation was amended and the effort to specially recover the amount of twice seven per cent. on this enforced deposit was stricken from the petition. The amendment also set forth that in Exhibit "A," attached to the petition, which described the notes on which usury was charged, the amount of the discount so charged HAD BEEN PAID at the maturities of each of the several loans by the borrower to the lender. (Record, pp. 6, 7.)

A demurrer was filed to the original petition (Record, p. 8), and was renewed to the amended petition (Record p. 10), and the Court sustained the same generally and dismissed the petition (Record, p. 12).

The case was carried to the Court of Appeals of Georgia by writ of error, and the judgment was affirmed. (See opinion, p. 31, and judgment, p. 22.)

A petition for a writ of certiorari was filed in the Supreme Court of Georgia (exhibit to petition for certiorari in this Court), and the same was denied (Record, p. 23 (54).

Petition for certiorari was then presented to this Court and the writ granted, and return thereto was duly made by the Clerk of the Court of Appeals of Georgia.

The petition against the defendant bank described the loans in Exhibit "A" thereto (Record, page 5), and for the sake of brevity we will refer to these loans by numbers. The first loan March 15th, 1915, note for 90 days, amount $5,000.00, discount charged in advance and paid by the borrower at maturity $109.73, etc., being called No. 1, and the ones following being numbered consecutively.

ASSIGNMENT OF ERRORS

The Superior Court erred in dismissing the petition on general demurrer, and the Court of Appeals erred in affirming the judgment of the lower court, because under the facts alleged in said petition, usury had been exacted by the National Bank from the Citizens & Screven County Bank, and the same had been paid, and a forfeiture of all interest thus paid on such usurious loans results under 5197, 5198, R. S.

Excessive charges were made by the defendant, in the loans referred to in the petition, which shows that usury was

charged the Citizens & Screven County Bank by the defendant, which has been paid by said Citizens & Screven County Bank.

The Court of Appeals of Georgia erred in not holding that the excessive discounts charged and paid themselves constituted the charging of usury by the defendant, for such excessive discounts so charged and paid coupled with the enforced deposit set forth, together did constitute a scheme to exact usury, all of which interest had been paid, and the defendant should be held liable for the penalty therefor as prescribed by the Act of Congress.

BRIEF AND ARGUMENT

We will cover the case as concisely as the facts and law may be stated.

Twenty-three loans are enumerated in Exhibit "A" (Record, page 5). The rate of interest per annum (laying to one side the enforced deposit of $10,709.31), actually deducted and charged against each of these notes, and which was paid by the borrower at the maturity of each of the loans was as follows: On the first note, .0873⅞%; on the second, .0824⅛%; on the third, .082%; on the fourth, .0788⅞%; on the fifth, .086%; on the sixth, .081%; on the seventh, .0805⅛%; on the eighth, .0809%; on the ninth, .0797%; on the tenth, .0797%; on the eleventh, .0768⅞%; on the twelfth, .0788⅞%; on the thirteenth, .088%; on the fourteenth, .080 plus %; on the fifteenth, .0788⅞%; on the sixteenth, .0788⅞%; on the seventeenth, .0789%; on the eighteenth, .0788⅞%; on the nineteenth, .0797%; on the twentieth, .0789%; on the twenty-first, .0789%; on the twenty-second, .0789%; on the twenty-third, .0788⅞%.

So that it will be clearly seen that in loans numbered 1, 2, 3, 4, 5, 6, 7, 8, 13 and 14, the discount actually deducted from the notes, and charged the borrower, was over eight

per cent. per annum, for the time the loan ran, and in all the other loans, the lowest discount actually charged was .07689%, in the eleventh loan, and in all others, ranging from that to .0797%.

And as a part of the scheme and plan to exact usury there was required to be kept on deposit the $10,735.00, which could not be used for any other purpose except to pay off the loans, which, of course, by virtue of the loss of the use of this sum, increased the rate of interest charged the borrower to more than the discount actually charged.

The Act of June 3rd, 1864, Chapter 106, 13 St. at L., pp. 99, 108, it will be noted, contained the definition of usury and the penalty for exacting the same, in one chapter, and in one paragraph. This paragraph was codified in the R. S. as Sections 5197 relating to the rate National Banks could charge, and 5198 the penalty for charging the same. The Act of 1864, Chapter 106, was amended by adding at the end the provision as to jurisdiction of suits under that section, by the Act of 1875.

In construing this Chapter 106 of the Act of 1864, we must, therefore, treat 5197, 5198 as if they constituted one paragraph relating to the interest rate National Banks may charge, and the penalties for charging the same, for that was the intention of Congress when the law was enacted, and the subsequent subdivision into paragraphs would not be considered any evidence of change of purpose.

The law of Congress exclusively fixes the rate and the penalty, as to National Banks in their interest rates on loans and discounts. But, Congress adopted for such associations, the interest rates that may be permitted by the laws of the States where such banks are located, and expressly provided that they could charge the highest rate

allowed by such law and NO MORE. And fixes the penalty where the greater rate than is allowed by the State has been paid at twice the amount of the interest thus paid.

We call attention to the excessive charges made by the lender, on the actual discounts charged, and the averment in the petition that the same were paid at the maturity of each loan. These most important and vital allegations were seemingly ignored by the Georgia Courts, who erroneously treated the petition as merely based on an allegation that eight per cent. per annum interest and no more had been charged in advance, and paid at maturity. We can not imagine how any court could hold that in Georgia, charging a discount of MORE THAN EIGHT PER CENT. PER ANNUM IN ADVANCE, could be deemed lawful under the Act of Congress or under the law of Georgia.

And even if the discount actually charged had in each of the loans been exactly at the rate of eight per cent. per annum (they were at a higher rate), we submit that such charges are usurious under the laws of Georgia, and the Court of Appeals of Georgia in this case held that under such State laws such a rate of discount charged in advance is usury under the State laws.

> Record, p. 16 (38).
> Loganville Banking Co. vs. Forrester, 143 Ga., 302.

The Act of Congress, Sec. 5197 R. S., mentions "loan or discount." And this Court has held that the terms "loan" and "discount" are synonymous.

> National Bank vs. Johnson, 104 U. S. 271.
> Morris vs. Third National Bank, 142 Fed. R. 25.

The petition in the case at bar shows that the defendant "loaned" the Citizens & Screven County Bank, certain amounts, deducting from the amount of the note certain discounts. All of the transactions were "loans."

The Georgia Statutes, relating to usury, applicable to the case at bar, are as follows, all being from Parks Annotated Code of Georgia, 1914:

> Sec. 2336.—Banks may charge same rates of interest as individuals. Banks incorporated by the laws of or doing business in this State may make the same contracts respecting the rate of interest to be paid for the loan of money as are lawful between individuals, and shall be liable to the same penalty, and no other incurred by individuals when they lend money at a greater rate of interest than that authorized by law; and all laws now in force respecting the rate of interest charged for the loan of money by individuals, shall be applicable to banks doing business in this State.

> Sec. 3426.—What is lawful interest. The legal rate of interest shall remain seven per centum per annum, where the rate per cent. is not named in the contract, and any higher rate must be specified in writing, but in no event to exceed eight per cent. per annum.

> Sec. 3427.—What is usury. Usury is the reserving and taking or contracting to reserve and take, either directly or by indirection, a greater sum for the use of money than the lawful interest.

Under the laws of Georgia as thus construed by its courts, a lender, whether a bank or an individual, can not receive for the use of money more than eight per cent. per annum. In other words the borrower can not lawfully contract to pay more than eight per cent. per annum for the use of the money he borrows. The law was passed in the interest of the borrower and for his protection, and not for the lender and his cupidity, and hence, what is usury under the Georgia law, is determined on what interest rate per annum the borrower pays, not what the lender gets.

We contend that under Section 5197 R. S., the rate allowed by the laws of Georgia is adopted by Congress, and that if a National Bank lends money in Georgia it can not lawfully deduct the highest contractual rate allowed by that law in advance, for it would be lending money at more than eight per cent. interest. If the Act of Congress can be construed as contended for by counsel for respondent, and as decided by the Court of Appeals of Georgia in this case, then a National Bank in Georgia, by making the maturity of the loan sufficiently remote, can charge any rate of interest the borrower will agree to pay it. For example, if the loan is for a year, and the eight per cent. is deducted in advance, the lender will receive more than eight per cent. for the use of the money. If the maturity is postponed for three years, then a much higher rate of interest would be obtainable, and if for a sufficiently long period of time, more than one-half or even all of the loan would be deducted as interest and the borrower receive nothing. The Supreme Court of Georgia in McCall vs. Herring, 116 Ga., page 244, pointed out the absurd results that could be accomplished.

Aside from the complexities of bookkeeping, we may have with the money in hand a lender, about to loan $1,000.00 for a year at 8 per cent. The lender charges 8 per cent. in advance, takes out $80.00 and hands $920.00 to the borrower, and the lender puts the $80.00 in a safety vault and leaves it therein for the year. In this case the lender would not actually realize more than $80.00 for the use of his money, but the borrower who paid the $1,000.00 at the end of the year will have paid more than eight per cent. for the use of the money, for he only used $920.00, and yet he has paid $80.00 for the use of same. And if the lender put his $80.00 discount, together with other money to another loan where he also charged eight per cent. in advance, the borrowers would not only have paid more than eight per cent. per annum interest, but the lender would have received more than eight per cent. for the use of his money.

In the first instance he would get $80.00 for the use of $920.00 ---------- $80.00

And 8% on $80.00 for a year, or ---------- 6.40

$86.40

And the borrower would have paid for the use of the $920.00, $80.00, which would be ---------- .0869 plus per cent. interest.

And so it happens, that irrespective of the laws of some States which hold that discounting at the highest rate in advance for short term loans is not usury, and irrespective of the early decision of Fleckner vs. The Bank, in 21 U. S. 338, which was rendered about forty-six years prior to the National Bank Act of 1864, which adopted the law of the State where the bank is located as to interest rates, Georgia has enacted and its courts so hold, that the practice of taking out the highest rate in advance can not be indulged in without running counter to the usury laws, and that is the law by which the right of the petitioner and the respondent are to be measured at this time, as to the rate.

The Act of 1864—13 Stats. at L., 108, which regulated the rate of interest that National Banks could charge, also gave National Banks power of discounting commercial paper. It always had the power of discounting paper, under previous special acts of incorporation, whereby National Banks acquired their charter powers. So that the power of discount under 5136 R. S., adds or subtracts nothing from 5197, 5198, and was not in anywise intended to limit the scope or meaning of 5197, 5198. And yet, we find most of the reasoning of the lower court based on this power of discount, and because discount means to take out in advance that a National Bank of course can take out the highest interest rate in advance, in spite of a State law to the contrary.

But, Congress intended equality between National Banks and State Banks, as to interest rates. While it might have

permitted National Banks to charge a higher rate than a State bank, the Act of Congress placed them on equality, in express and no uncertain language, providing that they were authorized to charge the highest rate **allowed** by the laws of the State AND NO MORE.

And the National Bank asks how may it discount in Georgia at 8 per cent. per annum, and not take out the same in advance?

For, says it: "Discount means take out in advance."

But the Georgia laws do not **ALLOW** interest at the rate of 8 per cent. per annum, IN ADVANCE. And, therefore, a National Bank in Georgia, if it wishes to discount at the highest rate allowed by the Georgia laws, must so regulate the rate of its discount, as not to charge the borrower more than 8 per cent. per annum for the use of the money loaned him. And that may be arrived at by a simple calculation, that is, it can only charge such a rate of discount, that such rate at eight per cent. per annum, added to the discount charged will equal eight per cent per annum. That is, the National Bank may charge a discount of $7.408 for the use of $100.00 for one year, and it will be lending its money at 8 per cent. per annum. For it may loan the $7.408 at 8 per cent. per annum, and it will receive .592 cents, which added to the discount, makes $8.00 per annum.

And in this illustration, the borrower will on payment of the loan be paying 8 per cent. per annum, for having received $100.00 less the discount, $7.40, or $92.60, he has paid $7.40 for the use of $92.60 for a year, and the interest on $92.60 for one year at 8 per cent. is $7.40.

Therefore, we contend, that in all of the loans scheduled in Exhibit "A," the discount charged on each loan was more than eight per cent per annum for the use of the money

loaned. The discount rate actually deducted was in every instance at least .078 per cent, and many of them over .08 per cent., and it could not legally in Georgia have been more than .074 per cent.

All of the loans were usurious under the laws of Georgia, regardless of the enforced deposit, which we will come to presently.

The State law is adopted by Congress, and what is usury under that law, if done by a person in that State, is usury if done by a National Bank located in that State, and if taking interest in advance at the highest rate is usury under the law of that State, it is usury if done by a National Bank in that State.

> Timberlake vs. First National Bank, 43 Fed. Rep. 231.
>
> Citizens National Bank vs. Donnell, 195 U. S. 374.

In the last cited case an effort was made to have 5197, 5198 construed to mean that a National Bank operating in Missouri which compounded interest at a rate of less than the highest rate, but compounded the same more frequently than allowed by Missouri laws, was within the law of Congress, because the compounding was at less THAN THE HIGHEST RATE AUTHORIZED TO BE CHARGED BY THE LAWS OF THAT STATE. The case, we submit, is direct authority with us in the instant case.

In Missouri parties are allowed to agree in writing for not over eight per cent. and parties may contract to pay interest on interest, but "the interest shall not be computed oftener than once in a year."

> 195 U. S. p. 373.

The contention was therein made that the statute against compounding did not affect the "RATE OF INTEREST," within 5198 R. S.

The respondent in the case at bar contends that the Georgia Statute as construed by the Supreme Court of Georgia, prohibiting taking eight per cent. in advance, can not affect the "rate of interest" allowed by 5197, 5198.

But this Court in the Donell case, supra, said:

> "We are of a different opinion. The rate of interest which a man receives is greater when he is allowed to compound than when he is not, the other elements in the case being the same. * * * The Supreme Court of Missouri holds that that is what the Missouri statute has done. On that point and on the question whether what was done amounted to compounding within the meaning of the Missouri statute, we follow the State court. Union National Bank vs. Louisville, New Albany & Chicago Ry., 163 U. S. 325, 331. Therefore, since the interest charged and received by the plaintiff was compounded more than once a year it was at a rate greater than was allowed by U. S. Rev. Stat. 5197, and it was forfeited."

We can not see any distinction in the principle laid down in the above case, and that contended for by us in this case. For taking eight per cent. per annum interest in advance, is taking usurious interest in Georgia, just as compounding in Missouri more frequently than therein allowed was usury there. And because the National Bank in Georgia may in the few instances enumerated wherein its discount was slightly less than 8 per cent. actually deducted from the note, but which discount was greater than any Georgia lender could charge legally, charged and received such discount at less than eight per cent. in advance, yet, the rate charged was GREATER than anyone else could lawfully

charge in Georgia for the use of money. And while in the Missouri case above, the bank compounded at even less than the highest rate, yet by compounding more frequently than allowed by the laws of the State it could not escape the penalty of the Act of Congress because after all what it charged the borrower was usury under the laws of the State.

In discussing U. S. Rev. Stat. 5197, 5198, this Court in Daggs vs. Phoenix National Bank, 177 U. S. p. 549, see page 555, said:

> "The meaning of these provisions is unmistakable. A national bank may charge interest at the rate ALLOWED by the laws of the State or Territory where it is located; AND EQUALITY IS CAREFULLY SECURED with local banks."

And the Court there said that "The intention of the national law is to adopt the State law, and permit to national banks what the State law allows to its citizens and to the banks organized by it."

Counsel for the National Bank contend that this Court in Farmers, etc. National Bank vs. Dearing, 91 U. S., page 32, held that taking interest by way of discount at the highest rate in advance was not usurious. Because on page 32, in analyzing the statute of Congress, the Court said "(4) Such interest may be reserved or taken in advance."

We submit that the only question decided in that case was whether the words "a rate of interest greater than aforesaid," meant in cases where no rate was fixed by the laws of the State, and that where such rate is fixed by the State laws, the consequences of taking usury is to be determined by the State laws. (See page 32, bottom of the page.) This Court in that case determined that the

consequences for taking usury were governed by the law of Congress, whether the rate was fixed by the laws of the State or not. Said the Court:

> "The offense of usury under this section is as great where the local law does not, as where it does, define the rate of interest."

id. page 33.

This Court, therefore, did not decide in the above case, that interest at the highest rate fixed by the laws of the State could be reserved in advance, by a National Bank, where in doing so, the State law denounced the practice as usury.

The statute of Congress itself provides for taking interest in advance, at not exceeding seven per cent. "When no rate is fixed by the laws of the State." And that is the only instance where the statute provides for taking the interest in advance.

R. S. Sec. 5197.

Another matter that should be called to the Court's attention is, that counsel for the respondent seeks to uphold the decision of the lower court on a point of practice, that usury was not sufficiently pleaded in the suit.

We contend that the petition as amended shows exactly the amount of the notes, the time the loans ran, the amount of the discount charged, what the excess over the legal rate is, and the amount of the usury, based on the excessive discount. The enforced deposit, of course, increased the amount of the usury, but it entails difficulty in figuring exactly how much the usury amounted to, based on the enforced deposit alone, but the petition shows that the use of this enforced deposit was worth at least seven per cent. to the

plaintiff, and that is admitted on demurrer, and seven per cent. on the enforced deposit is clearly and easily figured, for the enforced deposit was required during the entire series of loans. We therefore, can not follow the contention of counsel that we have not set forth the amount of the usury charged.

In addition, we contend that the law of Georgia relating to pleading of usury, must be construed along with 5197, 5198, R. S., for this reason, the Georgia statute, as in force at the time this suit was filed and at the time its laws relating to pleading usury were enacted, provided that the penalty for usury was a forfeiture of the interest in cases of loans, other than those secured by titles to property, and suit for this penalty had to be brought within a definite time, and in such suits, it was necessary to show the amount of the usury, for that was what would be sought to be recovered or set off as the case may be. These statutes of Georgia are as follows:

> Park's Code, 1914. Sec. 5674. "The plea of usury must set forth the sum upon which it was paid, or to be paid, the time when the contract was made, when payable and the amount of usury agreed upon, taken or reserved."
>
> Park's Code, 1914, Sec. 3438. "Any person, company or corporation violating the provisions of Section 2886, shall forfeit the excess of interest so charged, taken or contracted to be reserved, charged or taken."
>
> "Park's Code, 1914. Sec. 3441. "Any plea or suit for the recovery of such forfeiture shall not be barred by lapse of time shorter than one year."

We contend that the suit sufficiently shows that usury was charged and paid, irrespective of the enforced deposit, and sufficiently complied with the Georgia Statute relating

to pleading usury. We also contend that as to the enforced deposit, the suit sufficiently shows the amount of usury charged due to the enforced deposit; for the use of the money, being worth 7 per cent., would make that amount of interest on the enforced deposit usury that was charged. Of course it was paid, because the entire discount on the full face of the loans was paid, although the borrower had no use of the enforced deposit.

We also contend that the petition set forth a good cause of action, regardless of the Georgia statute, for the penalty under the Georgia statute is forfeiture of the EXCESS OVER THE LEGAL RATE of interest. While the penalty under the Act of Congress for charging usury, where the interest has been paid, is a forfeiture of twice the amount of interest charged and paid. Hence, under the Act of Congress, all that need be shown in the pleading is a loan or loans made by a national bank, a charging, reserving, etc., of a rate of interest greater than is allowed by the laws of the State, where such laws fix the rate, the payment of the interest to the National Bank, and the amount of interest so paid, and the penalty attaches, not for any excess interest, but for ALL interest so paid.

> **Talbot vs. Sioux City First National Bank, 185 U. S. 172.**

A pleading that sets forth these facts, under the Act of Congress sets forth a cause of action, for the State statute as to pleading usury only applies to cases brought under the State statute to recover the excess over the legal rate.

We say it is difficult to figure the exact amount of usury which the bank exacted, due solely to the enforced deposit; this is because the discounts were at fluctuating rates. If the discounts had been all at a flat rate of eight per cent., then eight per cent. could be figured on the enforced deposit for

the time maintained, and that would show exactly how much more was exacted by virtue of the enforced deposit. But where discounts are at .078 per cent., .082 per cent., etc., and the enforced deposit was required to be maintained during all that time, certainly the lending bank can not complain that the petitioner charges that seven per cent. on the enforced deposit, was what the bank derived as a benefit in addition to the discounts paid, because of the enforced deposit, for seven per cent. is less than any discount rate charged in any of the loans.

THE ENFORCED DEPOSIT OF OVER $10,000.00

The petition charged that the borrower was "required to keep on deposit with the lender at least $10,709.31, which could only be used towards the payment of the loan," and that it was thus maintained by the borrower and the purpose and intent of the lender was to knowingly charge and receive usury, because of all of the facts pleaded.

The defendant has much to say about a "special deposit," as if the petition could be construed to mean that the enforced deposit was money tied up in a bag and put on special deposit. The petition does not charge a special deposit, and

to pleading usury. We also contend that as to the enforced deposit, the suit sufficiently shows the amount of usury charged due to the enforced deposit; for the use of the money, being worth 7 per cent., would make that amount of interest on the enforced deposit usury that was charged. Of course it was paid, because the entire discount on the full face of the loans was paid, although the borrower had no use of the enforced deposit.

We also contend that the petition set forth a good cause of action, regardless of the Georgia statute, for the penalty under the Georgia statute is forfeiture of the EXCESS OVER THE LEGAL RATE of interest. While the penalty under the Act of Congress for charging usury, where the interest has been paid, is a forfeiture of twice the amount of interest charged and paid. Hence, under the Act of Congress, all that need be shown in the pleading is a loan or loans made by a national bank, a charging, reserving, etc., of a rate of interest greater than is allowed by the laws of the State, where such laws fix the rate, the payment of the interest to the National Bank, and the amount of interest so paid, and the penalty attaches, not for any excess interest, but for ALL interest so paid.

The measure of the rights of the national bank to interest is the State law.

Union National Bank *vs.* Louisville, etc., Ry., 163 U. S., 330, 331.

The Georgia statute as to pleading the exact amount of usury charged has not been applied to any cases except where one seeks to recover or set off the usury as such, where exact figures are necessary.

Carswell *vs.* Hartridge, 55 Ga., 415.

Hollis *vs.* B. & L. Ass'n, 104 Ga., 322; also, 147 Ga., 43.

Under the National Bank Act the penalty is twice the *interest* paid, where usury exists; hence under the Federal statute a pleading that discloses usury and the exact amount

the time maintained, and that would show exactly how much more was exacted by virtue of the enforced deposit. But where discounts are at .078 per cent., .082 per cent., etc., and the enforced deposit was required to be maintained during all that time, certainly the lending bank can not complain that the petitioner charges that seven per cent. on the enforced deposit, was what the bank derived as a benefit in addition to the discounts paid, because of the enforced deposit, for seven per cent. is less than any discount rate charged in any of the loans.

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The defendant has much to say about a "special deposit," as if the petition could be construed to mean that the enforced deposit was money tied up in a bag and put on special deposit. The petition does not charge a special deposit, and in the absence of a special demurrer, the language of the petition would mean what it said, and that it kept the amount on deposit, that is, not as a special deposit, but to its credit, but without the right to withdraw it generally.

A customer who puts money in bank to his credit is said to "deposit" the amount; he maintains a deposit, he deposits money in bank. This does not necessarily mean that it is a special deposit. He may deposit the sum generally, to his credit, and yet do so for the purpose of paying usury, as a part of a loan agreement.

The word "deposit," as defining money put in bank to one's credit account, is used advisedly in Fidelity & Columbia

Trust Co., etc. vs. City of Louisville, decided by this Court, Nov. 5th, 1917, where such deposits were held liable for taxation in the State where he resided, although the depositor resided in a different State from that in which the deposit was made.

> "Whether a particular deposit is general or special is a matter to be determined by the facts and circumstances attending the making of the deposit, and the rule is that a deposit is not special unless made so by the depositor or unless made in a particular capacity."
>
> Kentucky Bank vs. Wister, 2 Pet. 318.
> Minard vs. Watts, 186 Fed. 245.
> Schofield Mfg. Co. vs. Cochran, 119 Ga. 901.
>
> "And unless it is shown that the money is in a sealed packet or closed box, bag or chest when deposited in bank, the law presumes it to be a general deposit, because such deposit is esteemed the most advantageous to the depositary."
>
> Dawson vs. Real Estate Bank, 5 Ark. 283.
> Otis vs. Gross, 96 Ill. 612.

And as the charge is made that it was for the purpose of exacting usury, and this purpose, in relation to this enforced deposit could not well be accomplished, if the money was to be kept in a bag and not used, the petition would be construed to mean that the keeping of the sum on deposit meant to the credit of the depositor, for the petition charges that the use of said sum to the defendant bank was worth at least seven per cent. per annum, and was worth a like interest to the depositor.

The enforcing of the deposit was clearly usury; it could not well be held otherwise than a usurious device; usury laws would be abrogated if the lender could require a deposit

to be made as a condition to a loan; the worst forms of usury could thereby be practiced, and we believe the practice has become one that is prevalent throughout our country. It is a makeshift to get more than legal interest, and while all sorts of explanations are offered for the requirement, such as maintaining the credit of the borrower with the lender; making the account worth while to carry, etc., yet, it so happens, that the interest charged the borrower is calculated and paid ON THE ENTIRE FACE OF THE NOTE; not on the net amount loaned.

For clear decision condemning the practice, we cite,

East River Bank vs. Hoyt, 32 N. Y. Rep., 118.

Many pages of the argument of the learned counsel opposing the granting of the petition for certiorari, are given to the subject that the Statute of Congress on usury is supreme, and State statutes have no application. These decisions relate solely to the PENALTY for exacting usury. In every case where any language is quoted by opposing counsel as bearing on their contention that taking interest in advance is not usury, the Court will notice that the decision of this Court is treating of "penalties," and not authorized exactions. The question of what is usury, is left to the States to fix, if they care to do so; if they do not, Congress fixes it at the maximum of 7 per cent. per annum. But in either event the penalty for taking, reserving, etc., more interest, is fixed by Congress, and the State penalty does not apply.

There is only one other subject that should be called to the attention of the Court.

The Court of Appeals of Georgia, in its opinion, took up the petition in piece-meal. It held, as we contend erroneously, that taking the interest by way of discount as charged in the petition was legal, although in excess of the amount

allowed by the laws of Georgia. Having disposed of that question, it then took up as a separate and distinct proposition, that the enforced deposit although usurious, gave no right of action, because counsel in his brief, stated that the interest on this deposit had not been paid. And then arrived at the final conclusion that the lower court should be affirmed.

The brief that was before the Court of Appeals, is before this Court. The language of counsel referred to was in relation to the explanation of why the amendment was offered to the petition. The suit as originally brought sought to recover twice the amount of all discounts paid, PLUS twice 7 per cent. on the enforced deposit for the two years. The petition was amended, striking the twice 7 per cent. on the enforced deposit, because as that 7 per cent AS SUCH, had not been paid, it could not be recovered, but the petition as thus amended, set forth a case where NOT only excessive discounts in violation of law were charged and paid, BUT in addition thereto and as a part of the scheme to exact usury the enforced deposit was required, and the two together made out a clear case of usurious charges, which usury had been paid, to the extent of the discounts actually charged and paid.

We submit that the Court of Appeals of Georgia erroneously construed the language in the brief of counsel for the plaintiffs, and that the decision affirming the judgment of the Superior Court of Chatham County was erroneous.

Respectfully submitted,

FREDERICK T. SAUSSY,

Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919

NO. 67.

THOMAS J. EVANS, Sole Surviving Receiver of the Citizens & Screven County Bank, vs. NATIONAL BANK OF SAVANNAH.	Petition for Writ of Certiorari to the Court of Appeals, of the State of Georgia.

BRIEF FOR RESPONDENT

JACOB GAZAN,
EDWARD S. ELLIOTT,
Counsel for Respondent.

DETROIT:
CONWAY BRIEF CO., 142-150 LAFAYETTE BOULEVARD
1919.

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BRIEF FOR RESPONDENT

This is a suit brought in the Superior Court of Chatham County, Georgia, by the Receiver of the Citizens and Screven County Bank, petitioner here for the writ of certiorari, against The National Bank of Savannah, respondent to the petition for writ of certiorari, which demurred to the petition. The demurrer was sustained and the petition dismissed. Thereupon the Receiver took the case by writ of error to the Court of Appeals of Georgia, where the decision was affirmed.

Thereupon the Receiver applied to the Supreme Court of Georgia for a writ of certiorari to review the decision of the Court of Appeals, the writ was denied.

The petitioner applied to this Court for a writ of certiorari, which was granted.

We submit that there is only one Federal question involved in this case and that is whether a national bank doing business in the State of Georgia has the right to take interest in advance at the highest rate allowed by the state under the provisions of section 5197 of the revised statutes of the United States which permits discounts at the rate allowed by the law of the state where the national bank is located.

STATEMENT OF THE CASE.

The plaintiffs alleged in substance that the National Bank had knowingly received, charged, and taken from The Citizens and Screven County Bank interest in excess of the highest contractual rate allowed under the laws of the State of Georgia, and an exhibit was attached showing a list of the amount of loans made, the date when made, and the amount of and time when, interest charged, reserved and received by the defendant was paid by the plaintiff, and the amount of interest in excess of the legal or contractual rate allowed by law. (Record pp. 2, 3, 4.)

The list shows the interest charged in advance and deducted, the interest at 8% (which is the highest rate allowed by the laws of the State of Georgia) on the amount actually loaned, and excess over the highest contractual rate. (Record p. 5.)

By amendment the plaintiffs alleged that the defendant bank charged a discount against the said respective loans of the amount set forth in the column of said exhibit marked and headed "Interest charged in advance and deducted," and only passed to the credit of The Citizens & Screven County Bank the difference between the amount of such discount and the amount called for by the said notes. (Record pp. 6, 7.)

In substance, the petition alleged that the usury included all interest charged by The National Bank of Savannah against The Citizens & Screven County Bank, by which the amount actually charged in advance and deducted exceeded the interest at 8% on the amount actually loaned for the time of the loan.

It will be observed that, while the Plaintiffs alleged that they have calculated interest at 8% on the amount actually loaned, they mean interest at 8% on the amount actually received by The Citizens & Screven County Bank, or to express it differently, they take the amount actually received by The Citizens & Screven County Bank, calculate 8% on that amount for the time of the loan, and then allege that all interest in excess of that amount charged by the National Bank is usury.

In addition, the plaintiffs allege that the defendant National Bank further took, reserved, and charged a rate of interest greater than is allowed by law in that it was understood and agreed at the time of making all of said loans between the borrower and the lender, that The Citizens & Screven County Bank should at all times, while it was a borrower, keep on deposit with The National Bank at least the sum of $10,709.31, *which could only be used towards the payment of said indebtedness*, that such deposit was continuously and uninterruptedly maintained by the borrower under such requirement

with The National Bank, from November 2, 1914, till November 17, 1915, all of which was knowingly done for the purpose of exacting usury. (Record pp. 6, 7.)

Thereupon the plaintiffs alleged that they were entitled to recover from The National Bank the sum of $17,675.04, being double the amount of interest alleged to have been paid. The amendment further alleged the payment of the amounts alleged to have been charged as usury, and reduced the amount of the claim to $14,676.44. (Record p. 7.)

To this petition The National Bank filed its demurrer, and, when the amendment was allowed, it again demurred to the petition as amended, and it was this demurrer which was sustained by the Superior Court of Chatham County. (Record p. 8.)

The grounds of the demurrer were in substance as follows: (Record pp. 10, 11.)

1. That the petition did not set forth a cause of action.

2. That the said petition is a petition to recover double interest by reason of the usury charged, and that the usury is not set forth with sufficient particularity, and there is no allegation in the said petition of the payment of the usurious interest.

The substance of the *third, fourth and fifth grounds of demurrer* is that the petition is insufficient in that the petition undertook to charge usury by merely setting up the date of the loan, the maturity of the loan (that is, number of days to maturity), amount of loan, interest charged in advance and deducted, interest at 8 per cent on the amount actually loaned (that is, received by borrower) and the alleged excess over the highest contractual rate, and that said alleged statement of usu-

ty is insufficient in that there is no inhibition under the laws of the United States against charging interest in advance by way of discount at the highest rate allowed by the laws of the State (the statute on this subject will be set out herein later), and said laws allow a National Bank to charge interest in advance at the rate of 8 per cent per annum, being the highest rate allowed by the laws of Georgia, so that the alleged schedule of usury is defective in that it does not calculate interest on the face of the note, but on the amount alleged to be actually loaned.

That the allegation that The National Bank knowingly had received from The Citizens & Screven County Bank a rate of interest greater than is allowed by law is incorrect and insufficient in that the exhibit referred to does not show whether or not the amount charged is in excess of 8 per cent per annum in advance on the face of the note: the amount on which usury is to be charged is on the face of the note and not on the amount actually loaned; in other words, under the statute of the United States a discount of 8 per cent in advance for the time of the loan deducted from the loan so that the borrower receives only the face of the note less 8 per cent interest in advance for the time of the loan does not constitute usury and is not unlawful under the statute of the United States.

That the schedule referred to in paragraph 2 does not show usury paid on the respective amounts set out in that the interest charged and reserved is not under the laws of the United States charged and reserved on the amount of the loan after deducting the discount, but on the amount of the loan before deducting the discount and the allegations of usury paid are incorrect in that such allegations show payment of interest charged on the amount of loan after deducting the interest instead of

calculating interest on the amount of loan before deducting discount.

The sixth ground of the demurrer is that the allegations in reference to the special deposit were vague, indefinite, and insufficient and do not, of themselves or as construed with the rest of the petition, constitute usury under the laws of the United States.

The seventh ground is that the allegations of payment of usury are insufficient in that the usury not being correctly set forth, as hereinbefore set out, the payment thereof could not constitute usury.

The Superior Court of Chatham County, Georgia, sustained the demurrer to the amended petition and dismissed it. (Record p. 12.)

Thereupon the plaintiffs took the case to the Court of Appeals of Georgia, which affirmed the judgment of the Superior Court of Chatham County, Georgia. (Record p. 14.)

Thereupon the plaintiffs applied for a writ of certiorari to the Supreme Court of Georgia, which denied the application for the writ. (Record p. 23.)

A writ of certiorari was granted by this court.

LAW POINTS

In entering upon a discussion of the law points involved in this case, we think we should call to the attention of the Court that the main question involved in this case is whether or not The National Bank of Savannah had a right to charge 8 per cent in advance on the loans and discounts made.

This arises in the following manner: The plaintiffs have alleged that The National Bank charged usury and that the usury consisted in charging an amount in excess of the highest legal rate.

In order to arrive at the amount charged in excess of the highest legal rate, to-wit, 8 per cent, they state the amount of each loan, then the amount that was deducted by way of interest from that loan by The National Bank, and they calculate that all is usury in excess of the difference between 8 per cent on the amount actually received for the time of the loan and the amount actually charged as interest.

Therefore, there can be no other way of viewing the allegations of the petition than that the pleader charges that all is usury that exceeds 8 per cent for the time of loan on the amount actually received by way of loan, in other words, that 8 per cent in advance on the amount of the loan before deducting the interest is usury.

We think that the question at issue may be for convenience set out in the following propositions and we will hereinafter demonstrate their correctness.

I. The Acts of Congress, providing for the creation and operation of National Banks, are the charter of such banks, and their terms and provisions are alone applicable to National Banks.

II. The Acts of Congress, as construed by the Courts of the United States, are the law of the land, and the Courts of all the States are bound, in all matters relating to the National Bank Act, to conform their opinions and decisions to the construction of that law as announced by the United States Courts.

III. Under the National Bank Act, not only by its express language, but also as construed by the United States Courts, National Banks are permitted to take discount at the highest legal rate authorized by the laws of the State, in which such bank does business, and thus in Georgia, discounting at 8% does not constitute usury, although, if done by a State bank, it would be usurious.

IV. Only one Federal question is involved in this case.

V. The special deposit involved in this case is not usurious.

VI. The usury, alleged in this case, is not so pleaded as to warrant a recovery.

VII. Contentions of the petitioner.

Of each of these in their turn.

I.

The Acts of Congress providing for the creation and operation of National Banks, are the charter of such banks, and their terms and provisions are alone applicable to National Banks.

We quote the following as being the material portions of the charter of National Banks as set out in the Acts of Congress, so far as they relate to the case at bar.

Sections 5197, 5198, and also the 7th paragraph of Section 5136 of the Revised Statutes of the United States as they will be referred to hereinafter are now set out in full.

"RATE OF INTEREST LIMITED."

"Section 5197—Any association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exhange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or district where the bank is located, and no more, except that where by the laws of any State a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this Title. When no rate is fixed by the laws of the State, or Territory, or district, the bank may take, receive, reserve or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days from which the note, bill, or other

evidence of debt has to run. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount or sale, at not more than the current rate of exchange for sight-drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest."

"PENALTY FOR TAKING USURIOUS INTEREST."

"Sec. 5198.—The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred."

"Section 5136 states the corporate powers of banking corporations, and the seventh paragraph thereof follows:

"Seventh. To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this Title."

The following from the Supreme Court of the United States sufficiently shows the soundness of proposition laid down.

In *Farmers & Mechanics National Bank vs. Dearing*, 91st United States, pp. 29-33, the Court lays down the principles governing National Banks as follows: "The National Banks organized under the act are instruments designed to be used, to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which existed for creating them, Congress is the sole judge.

Being such means, brought into existence for this purpose, and intended to be so employed, the States can exercise no control over them, nor in anywise affect their operation, except in so far as Congress may see proper to permit. Anything beyond this is 'an abuse, because it is the usurpation of power, which a single State can not give.' Against the National will, 'the States have no power, by taxation or otherwise, to retard, impede, burthen or in any manner control the operation of the Constitutional laws enacted by Congress to carry into execution the powers vested in the General Government.'"

This matter has been also passed on by the Court of Appeals of Georgia as follows:

"Whenever the power or liability of a National Bank is called into question, necessarily a Federal question is involved, and consequently the United States Supreme Court is the ultimate and paramount authority on the subject; and all authorities of State Courts to the contrary must yield. California National Bank vs. Kennedy, 167 U. S. 362 (42 L. ed. 198). These institutions are so far governmental agencies of the United States as that wither State statutes nor State decisions can impose any

liability inconsistent with the liability intended by the Federal statutes, as construed by the Supreme Court of the United States."

Hansford vs. National Bank of Tifton, 10 Ga. App., 270.

The authorities cited under the next heading also apply here.

II.

The Acts of Congress, as construed by the courts of the United States, are the law of the land, and the courts of all the states are bound, in all matters relating to the National Bank Act, to conform their opinions and decisions to the construction of that law as announced by the United States Courts.

This proposition has been thoroughly established, both in the Supreme Court of the United States, and State Supreme Courts throughout the United States, including the Supreme Court of Georgia.

We might cite many authorities, but we deem it unnecessary, and will simply refer to the following, which we think amply demonstrate our proposition.

In the case of *Bates vs. The First National Bank of Dalton*, 111 Ga., pp. 757-758, it is held that while the rate of interest which a National Bank is authorized to charge is covered by the law of the State in which the bank is located, "*the penalty to be imposed upon such a bank for exacting usury is that prescribed by the Act of Congress providing for the creation of National Banks.*" This case quoted on page 758, with approval, the case of *Farmers & Mechanics National Bank vs. Dearing*, 91 U. S., p. 29; and, also, *Barnett vs. Bank*, 98 U. S., p. 555.

In the case of *First National Bank of Dalton vs. McEntire*, 112 Ga., p. 232, it is held that the penalty prescribed in Section 5198 of the Revised Statutes of the United States upon National Banks for charging usury *is exclusive*, and quotes a number of authorities sustaining this proposition on page 235. And, consequently, this case distinguishes between a State Bank and a National Bank, and holds that a waiver of homestead and exemption in a promissory note, infected with usury, is not void when the note is payable at a National Bank, though it would be at a State Bank.

The United States Supreme Court, in discussing a usury case holds as follows: *"The statutes of Ohio and Indiana on the subject of usury may be laid out of view. They can not affect the case."* *Barnett vs. National Bank*, 98 U. S. 555, 558.

This subject has also been dealt with by the Court of Appeals of Georgia in *Reese vs. Colquitt National Bank*, 12th Ga. Appl., p. 472, where it is held that State statutes relating to usury, and prescribing penalties for the charging, reserving or taking of usury have no application to negotiable instruments held by National Banks. The penalties fixed by the United States Revised Statutes, section 5198, against National Banks for "the taking, receiving, reserving or charging" of usury, and the remedy given by the Act of Congress against National Banks for taking usurious interest, *are exclusive*. *First National Bank vs. Davis*, 135 Ga. 687, 691.

And again in *183 U. S., page 13½*, *Haseltine vs. Bank*, in a National Bank case, the note in question having been given to a National Bank, the Court says *"The definition of usury, and the penalties fixed thereto must be determined by The National Banking Act, and not by the laws of the State"* quoting *Farmers & Mechanics National Bank vs. Dearing*, 91st U. S., p. 29.

In the case cited in *135 Ga.*, it is held "*but the remedy given by the Act of Congress against National Banks for taking usurious interest is exclusive.*"

In the case at Bar, the Court of Appeals of Georgia held as follows, which we cite as authority and also as absolutely following the principles laid down in the cases cited:

"The Acts of Congress providing for the creation and operation of National Banks, as construed by the Federal Courts, constitute the ultimate and paramount authority on the subject. *Hansford vs. National Bank of Tifton*, 10 Ga. App., 270; *Farmers National Bank vs. Dearing*, 91 U. S., 29; *Bates vs. First National Bank of Dalton*, 111 Ga., 757; *First National Bank of Dalton vs. McEntire*, 112 Ga., 232; *Reese vs. Colquitt National Bank*, 12 Ga., App., 472. In *Haseltine vs. Bank*, 183 U. S., 134, the Supreme Court of the United has said: "The definition of usury, and the penalties fixed thereto, must be determined by the National Banking Act, and not by the laws of the State." (R. p. 17.)

So the State laws can not control on the subject of usury.

III.

Under the National Bank Act, not only by its express language, but also as construed by the United States Courts, National Banks are permitted to take discount at the highest legal rate authorized by the laws of the State in which such bank does business, and thus in Georgia discounting at 8% does not constitute usury, although, if done by a State Bank in Georgia, it would be usurious.

We wish to call to the attention of the Court that under the very language of *Section 5197* of the Revised Statutes of the United States discount, which is necessarily taken out in advance, is permitted at the highest rate allowed by the laws of the State; it reads as follows: *Any* (National Banking) *Association may take, receive, reserve and charge on any loan or discount made, or upon any note, bill of exchange or other evidences of debt, interest at the rate allowed by the laws of the State, territory or district where the Bank is located and no more.*

It will be further observed that, under the language of the seventh paragraph of section *5136 R. S. U. S.* giving the powers of a National Bank, *discounting* is included.

We propose to show by the authorities that discount means necessarily charging interest in advance and, this power being expressly conferred as stated upon National Banks, it necessarily follows that a National Bank can charge in advance the highest rate of interest allowed by the law of the State in which it is located, being in this case 8 per cent., which is allowed by the laws of Georgia by contract in writing.

In the case of *Farmers National Bank vs. Dearing*, 91 U. S., p. 29, the Court dissects Sections 5197-5198 on page *32*, and among the points of the dissection is the following: *(4)* "*Such interest may be reserved, or taken in advance.*" This decision was not really necessary, because the Statute itself, which constitutes a part of the charter of the National Banks, that is Section *5136*, as quoted above, and Section *5197* expressly recognize that a National Bank may charge interest on any *loan* or *discount*. But, in an early case in the United States Supreme Court, *Fleckner vs. Bank of United States*, 8th Wheaton, p. 338, the Court held in its headnote this: "*Discounting from the sum due on a note the amount of the interest at the rate of six (6%) per cent., for the residue of the time the note has to run is not usurious.*"

On page *351*, the Court says: "*Nothing can be clearer than that by the language of the commercial world, and the settled practice of banks, a discount by a bank means, ex vi termini, a deduction or drawback made upon its advances or loans of money, upon negotiable paper, or other evidences of debt, payable at a future day, which are transferred to the bank.*"

And on page *354* the Court expands upon these announcements, and states that an authority to *discount* or *make discounts* from the very force of the terms necessarily includes an authority *to take interest in advance*. "*And this is not only a settled opinion among professional and commercial men, but stands approved by the soundest principles of legal construction. Indeed, we do not know in what other sense the word discount is to be interpreted. Even in England, where no statute authorises bankers to make discounts, it has been solemnly adjudged that the taking of interest in advance by bankers, upon loans in the ordinary course of business, is not*

usurious." This decision was rendered by the famous *Judge Story.*

It is a leading case and has been many times followed by the Supreme Court of the United States. This case has been cited by the Supreme Court of Georgia to show that *such practice is well settled.*"

Union Savings Bank vs. Dottenheim, 107 Ga., 606, 614, which says:

"It is also well settled that a contract providing for the payment of the highest lawful rate of interest in advance is not usurious; though many of the Courts which recognize this as an established rule express doubts as to whether upon principle such practice should be allowed to prevail."

And the Court supports this doctrine by a dozen or more citations of authorities, among which are a number cited on this brief, including the Fleckner case. And in addition thereto the Court cites the case of *Fowler vs. Trust Company*, 141 U. S., p. 384, and the range of cases covers *Indiana, New York, Virginia, Kansas, Massachusetts and Vermont.*

This case has been reversed as to the usurious feature because the State of Georgia prohibits a charge of the highest legal rate by discount, but it has not been reversed as to what is well settled and the general rule prevailing as to discounts.

In the lower Court the counsel for the petitioner undertook to say that the decision in the Fleckner case has not been generally recognized as authority for the legality of the practice of taking interest in advance and in his comment on that case in the lower Court he said that the Supreme Court of the United States "was deal-

ing with the general question, which has received a different construction in Georgia."

As we will show below, the Supreme Court of Georgia has not given a different construction to the general law but simply to the special statute in Georgia, but we cite the following to show that the Fleckner case has been recognized as authority in many cases.

In *Danforth et. al., vs. National State Bank of Elizabeth, decided in the Circuit Court of Appeals, of the Third Circuit, 1891*, that Court, on page 273, 48 Fed. Rep., refers to the case of *Fleckner vs. The Bank*, and says that Judge Story held "*nothing can be clearer than that by the language of the Commercial World, and the settled practice of banks, a discount by a bank means ex vi termini, a deduction or draw-back, made upon its advances or loans of money upon negotiable paper or other evidences of debt, payable at a future day, which are transferred to the bank*," and it was added that if the transaction there was a purchase, it was "*a purchase by way of discount.*"

In Morris vs. Third National Bank of Springfield, 142 Fed. Reporter, p. 25 *the Court of Appeals of the Eighth Circuit, in 1905*, decided that the power to discount promissory notes, and other evidences of debt, expressly given to National Banks by Revised Statutes, *5136*, is sufficiently comprehensive to include the purchase of notes at less than their face value, and in this case *certiorari* was *denied by the Supreme Court in 201st U. S., 649.*

In that case, on page 31, the Court holds that the discounting of promissory notes, and other evidences of debt is within the express granted power of National Banks (Revised Statutes *5136*), and that term is sufficiently comprehensive to include the acquisition both by way of purchase, and by way of ordinary loan (*Bank*

vs. Johnson, 104 U. S., 271; *Fleckner vs. Bank*, 8th Wheaton, 338; *Danforth vs. Bank*, 48 Fed. 271; *Bank vs. Savery*, 82 N. Y. 291; *Pape vs. Bank*, 20th Kansas, 440.)

In *National Bank vs. Johnson*, 104 U. S., 276, *decided in 1881*, the court says "in *Fleckner vs. Bank of the U. S.*, 8th Wheaton, 338, Mr. Justice Story said, quoting his words as set out aforegoing; and on *page 277*, the Court holds that specific power is given to National Banks, Revised Statutes *5136*, "*to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt;*" the Court stating "*so that the discount of negotiable paper is a form according to which they are authorized to make their loans, and the terms 'loans' and 'discounts' are synonyms,*" and further on the Court holds that discounting paper, as understood in the business of banking, is only a mode of loaning money, "*with the right to take the interest allowed by law in advance.*"

This case of *Fleckner vs. Bank of the United States*, so far as it decided that taking interest in advance by bankers upon loans in the course of ordinary business, is not usurious, is cited and that rule applied in the following cases:

Bank vs. Cook, 60 Ark. 293, 29th L. R. A. 761;

McGill vs. Ware, 4th Scam., 26, where the highest legal rate was taken in advance.

Vahlberg vs. Keaton, 51 Ark. 541, 43h L. R. A. 462.

Hass vs. Flint, 8th Blackford, 67.

English vs. Smock, 31 Ind., 116.

Tholen vs. Duffy, 7th Kansas, 409, *cited in the note 29 L. R. A., 761*, in which last named case, it was said "*in cases where note or bill is given, it is supported by such an overwhelming current of decisions, and is a matter*

of such universal practice, that it may well be considered as engrafted upon the law as a settled rule," and in this case, it was held, that it was lawful to take interest in advance on note and mortgage given for one year.

Nowell vs. National Bank, 12 Bush. (Ky.) 60.

Duncan vs. Maryland Sav. Inst., 10 Gill & J., 311.

Lyons vs. State Bank, 1st Stew., 469.

It will be noted all loans in this case are less than five months.

Bank of Utica vs. Wagner, 2nd Cow, 767. Savage, Chief Justice, rendered the opinion, and on page 767, quotes *Fleckner vs. Bank of U. S.*, 8th Wheaton, 338, and states that Judge Story, in giving the opinion of the Court *(8th Wheaton, 354)*, observes the *authority to make discounts (as in R. S. 5136), means an authority to receive the interest in advance;* the same doctrine, says the Court, has been recognized in *Pennsylvania* and in *Massachusetts.*

Stribbling vs. The Bank, 5th Rand., 144.

Grigsby vs. Warer, 5th Leigh, 213.

Planters Bank vs. Snodgrass, 4th Howard (Miss.), 627.

Bank of Genera vs. Howlett, 4th Wend. 332, cited in the note to the *Bank vs. Cook*, 29th L. R. A., so that *we assert* that the case of *Fleckner against the Bank* has been cited, approved and followed in the foregoing, amongst other cases, and can state that it is generally recognized as authority for the legality of the practice.

Further counsel for petitioner said that our own Court, in 107 Ga., page 614, in reference to deducting interest at the highest rate in advance, says *"Though many of the Courts which recognize this as an established rule, express doubts as to whether upon principle*

such practice should be allowed to prevail." Instead of citing the whole of this sentence of our Court, as we did as follows: "*It is also well settled that a contract providing for the payment of the highest lawful rate of interest in advance is not usurious, through many of the Courts which recognize this as an established rule, express doubts as to whether upon principle, such practice should be allowed to prevail.*" They quote the last half only, and then cite the case of *Fleckner vs. The Bank*, 8th Wheaton, 338, as supporting this doubt.

The case of Fleckner vs. The Bank, does not express any doubt. The case 107 Ga., 614, cited the *Bank of New Port vs. Cook*, 29 L. R. A. 761; *Insurance Company vs. Sturges*, 2nd Cow., 664; *Fleckner vs. Bank of the U. S.*, 8th Wheaton, 338; *Tholen vs. Duffy*, 7th Kansas, 405; *Fowler vs. Trust Company*, 141 U. S., 384, in not *one of which* is there any "*doubt*" expressed "*as to whether upon principle such practice should be allowed to prevail.*" It may be that in some one of the other cases cited by the Supreme Court there may be a doubt. Certainly there is no such doubt in *Bank vs. Bissell*, 12 Pick., 586, because that case, in the conclusion thereof, says "*Upon the other point that taking the interest in advance is usurious, we think it too well settled by a series of decisions, both in this and other states, to be now questioned that such practice is not a violation of the statute and does not render the contract usurious.*" Nor was any doubt expressed in the case of the *Maine Bank vs. Butts*, 9th Mass., 49, as we have that authority before us, and find none such.

Why then does the petitioner venture to claim that the decision in 8th Wheaton "has not been generally recognized as authority for the legality of the practice." He does not cite a single case where the case of Fleckner vs. The Bank has been reviewed or reversed, or where

it has been at all criticized, as against all the array of authorities cited by us above approving and following it.

The Supreme Court of the United States has recently held, that the charging of interest in advance by way of discount is the usual method of banks doing business, as follows:

"Banks may make ordinary loans and charge interest to be collected at the maturity of the note. But, as they usually reserve and deduct it in advance by way of discount, the Statute is framed so as to apply to cases where the interest is paid by the debtor as well as to those in which it is reserved by the bank."

McCarthy vs. First National Bank, 223 U. S., 493, 499.

A case, which expressly decides the point involved in the case at bar, is found in

Baker et al., vs. Lynchburg National Bank, 91 S. E., 157,

decided by the Supreme Court of Appeals of Virginia on January 11th, 1917.

That case involved a suit for penalty for usury and the point was expressly made that discount retained or reserved by the bank on its loans was usurious.

The statute under discussion in the case at bar was directly involved and the Court held as follows:

"None of these payments (of interest) included a greater rate of interest than one-half of one per cent. for 30 days on the face of such renewal notes. This rate the bank had the legal right to charge and receive in advance under Section 5197, R. S. U. S. (U. S. Comp. St. 1913, Section 9758.)"

The highest legal rate of interest in Virginia was 6 per cent., therefore as the rate charged was one-half of one per cent, for 30 days that was 6 per cent. per annum

and the Supreme Court of Appeals of Virginia expressly held that the bank had the legal right to charge and receive this *in advance under Section 5197 of the R. S.* In other words, the Court was not deciding whether or not the Statute of Virginia authorized the 6 per cent interest to be charged in advance, but specifically held that interest at the highest rate allowed by the laws of the State was properly charged and received in advance under the laws of the United States.

In the *29th volume of L. R. A., p. 761*, in the case of the *Bank of Newport vs. Cook* (Arkansas), it is held (see headnote 2nd), that taking interest in advance on a negotiable note at the highest rate allowed by the Constitution is not usury. And there is an elaborate note to this decision, in which decisions are collected from a number of States supporting this proposition.

Among these States are *Vermont, Kansas, Arkansas, New York, Alabama, Massachusetts, Michigan, Cranch Circuit Court Reports of the United States, Illinois, Virginia, Texas, Connecticut, Nebraska*, and likewise so decided in *England*.

Among these cases we find that in one of the Alabama cases it is held that charter authority to take interest at a certain rate is held to be equivalent to authority to discount at that rate, and to permit taking of interest in advance. And, again, we find in *4th L. R. A., 464*, that the Supreme Court of Arkansas holds, referring to 12th Statute of Anne, that the American States have followed English Statutes as a model, and the American Courts have adopted the construction given it by the English Courts. Consequently, the Court finds "*that the Courts uniformly hold at the present day that the interest for ordinary paper, having usual time to run, such as is the custom of banks, may be taken in advance by*

way of discount and not subject the paper to that taint of usury." Quoting *8th Wheaton, p. 354,* and a number of other cases, and text books.

Vahberg vs. Keaton, 51 Ark., 541.

In the *National Bank vs. Johnson*, 104 U. S, 271, 277, the Court, after quoting fully *Fleckner vs. The Bank of the United States,* 8th Wheaton, p. 338, proceeds to enlarge upon the term discount, and holds that this power of discounting is given to National Banks by Section *5136.* And the Court says, on page *277,* that the discount of negotiable paper is the form according to which they are authorized to make their loans, "*and the terms, loans and discounts are synonyms.*" And further the Court says that whether loans or discounts are identical in the sense of Section *5197* is quite immaterial, for both are expressly made subject to the same rate of interest.

That case is also authority for the proposition that to discount paper, as understood in the business of banking, is only a mode of loaning money with the right to take the interest allowed by law in advance.

In *Barnett vs. The National Bank, heretofore cited,* 98th U. S., p. 558, the Court holds, referring to the two States where the commercial paper operated, as follows:

"*The Statutes of Ohio and Indiana upon the subject of usury may be laid out of view. They can not affect the case.*"

"*Where a Statute creates a new right of offense and provides a specific remedy or punishment it alone applies.*" Such provisions are exclusive, *quoting 91 U. S., p. 29.*

In the case of *Morris vs. Third National Bank of Springfield, Mass.*, 142 Fed. Rep., p. 25, 31 (already cited), it was held by the Circuit Court of Appeals, 8th

Circuit that a distinction is held in some of the State usury laws between a purchase and discount of commercial paper. But the Court holds that no such distinction can be made, and states *"the discounting of promissory notes and other evidence of debt is within the express granted powers of National Banks." Revised Statutes U. S., Sec. 5136.* And the Court further holds that that term is sufficiently comprehensive to include the acquisition both by way of purchase and by ordinary loan, quoting *104 U. S., p. 271,* and a number of other cases, including *8th Wheaton, 338. Certiorari denied 201 U. S., 649.*

We take it, therefore, that it makes no difference whether the discount is in the way of purchase of notes, or in the way of purchase by way of discount, or in discounting notes or loans. The effect is the same.

"Banks are within the usury laws; but discounting interest for the whole time of the loan from its amount is not usury." (Headnote.)

"The taking of interest in advance upon the discount of notes in the usual course of business by a bank is not usury. This doctrine has been long settled and is not now open for controversy."

Thornton vs. Bank of Washington, 3 Peters, 36.

"When a statute fixes the rate of interest per annum, it has always been held that parties may lawfully contract for the payment of that rate, before the principal debt becomes due, at periods shorter than a year."

Myer vs. City of Muscatine, 1 Wallace, 384.

In considering this statute we must also consider the conclusion of it, which reads as follows:

"But the purchase, discount or sale of a bona fide bill of exchange, payable at another place than the place of

such purchase, discount or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest."

This necessarily implies that this interest can be taken in advance and this is confirmed by the following decision, which says:

"The Bank had by the express words of the statute, the right to charge and receive the current rate of exchange for sight drafts, in addition to interest at the rate of six per cent. per annum, which is the rate fixed by general statute in the State of Pennsylvania."

Wheeler vs. The Union National Bank of Pittsburg, 96 U. S., 268.

The case of *Bank of Metropolis vs. Moore,* 5 Cranch (C. C.), 518, 2 Fed. Cas. 901, was taken to the Supreme Court of the United States and affirmed.

On the subject of usury, it is said in the decision,

Moore vs. Bank of Metropolis, 13 Pet. 302, see page 309 at bottom as follows:

"It is unnecessary to notice these instructions (on subject of usury.) For all exceptions on this account were abandoned, as raising a question too well settled to be now drawn into discussion."

The decision was rendered in 1839.

Furthermore, the Supreme Court of Georgia itself once held that the doctrine that taking interest in advance was not usury and that that doctrine was well settled. See the following:

"It is well settled that the taking of interest in advance on short loans in the usual and ordinary course

of business is not usurious, if the interest reserved does not exceed the usual rate.

Tyler on Usury, 155, 156."

MacKenzie vs. Flannery, 90 Ga., 590, 599.

That case was reversed, but it did not reverse the fact that it was "well settled" that charging interest in advance is not usury on *short* loans.

All the loans in this case are short loans.

The following cases also show that charging interest in advance at the highest rate allowed by law is not usurious.

National Life Insurance Co. vs. Pitman, 238 Ill. 283, 87 N. E., 356;

Rose vs. Munford, 36 Neb. 148, 54 N. W. 219;

Foster vs. Pittman, 89 N. W., (Neb.), 763;

Sanford vs. Lundquist, 80 Neb. 414, 118 N. W. 129;

Hoyt vs. Bridgewater Mining Co., 6 New Jers., Eq., 253;

Metz vs. Winne, 15 Okl. 1, 79 p. 223;

Covington vs. Fisher, 22 Okl. 207, 97 Pac. 615.

The following cases from South Carolina are expressly in point:

"A contract providing for payment of eight per cent. interest in advance, and when not so paid to draw interest until paid at same rate is not usurious."

Newton vs. Woodley, 55 S. C. 132, 32 S. E., 532, 33 S. E. 1.

Heyward vs. Williams, 63 S. C. 470, 41 S. E. 550.

Tate vs. Lenhardt, 96 So. East, (S. C.), 720.

Both which cases approve *Newton vs. Woodley.*

Referring to the question of charging interest in advance, the Supreme Court of South Carolina in the last named case says:

> "Therefore the principle decided in *Newton vs. Woodley* was reaffirmed in *Heyward vs. Williams*, 63 S. C., 470, 41 S. E. 550 by unanimous decision and has ever since been the settled law of the state."

The following note from Vol. 37 American and English annotated cases 1915 C., p. 1156, states the matter very clearly and is therefore quoted here (some of the cases mentioned have already been cited.)

"The practice, originating in the custom of banks and those dealing in commercial paper in the course of taking interest in advance on short term loans, though admitted to be usurious in principle, has become a recognized legal right, and in the absence of statutory prohibition the courts are unanimous in upholding its legality where the loan or forebearance is for a period of time of one year or less.

England.—*Marsh vs. Martindale*, 3 B. & P. 154; *Floyer vs. Edwards*, 1 Cowp. 112, 98 Eng. Rep. (Reprint) 995; *Lloyd vs. Williams*, 2 W. Bl. 792, 96 Eng. Rep. (Reprint) 465; *Auriol vs. Thomas*, 2 T. R. 52. See also *Hamlett vs. Yea*, 1 B. & P. 144; *Maddock vs. Hammett*, 7 T. R., 180.

United States.—*Thornton vs. Washington Bank*, 3 Pet. 36, 7 U. S. (L. ed.) 594; *McLean vs. Lafayette Bank*, 3 McLean 587, 16 Fed. Cas. No. 8, 888; *Alexandria Bank vs. Mandeville*, 1 Cranch (C. C.) 552, 2 Fed. Cas. No. 850; *U. S. Bank vs. Crabb*, 2 Cranch (C. C.) 299, 2 Fed. Cas. No. 913; *Union Bank vs. Gozler*, 2 Cranch (C. C.) 349, 24 Fed. Cas. No. 14, 358; *Bank of Metropolis vs. Moore*, 5 Cranch (C. C.) 518, 2 Fed. Cas. No. 901, affirm-

ed in 13 Pet. 302, 10 U. S. (L. ed.) 721. And see *Union Bank vs. Corcoran,* 5 Cranch (C. C.) 513, 24 Fed. Cas. No. 1435.

Alabama.—*Lyon vs. State Bank,* 1 Stew. 442; *Branch Bank vs. Strother,* 15 Ala. 51.

Arkansas.—*Vahlberg vs. Keaton,* 51 Ark. 534, 11 S. W. 878, 14 Am. St. Rep. 73, 4 L. R. A. 462; *Baird vs. Millwood,* 51 Ark. 548, 11 S. W. 881; *Newport Bank vs. Cook,* 60 Ark. 288, 30 S. W. 35, 46 Am. St. Rep. 171, 29 L. R. A. 761; *Helena First Nat. Bank vs. Waddell,* 74 Ark. 241, 4 Ann. Cas. 18, 85 S. W. 417. See also *McKiel vs. Real Estate Bank,* 4 Ark. 592; *Thompson vs. Real Estate Bank,* 5 Ark. 59; *Reed vs. State Bank,* 5 Ark. 193; *Mcgruder vs. State Bank,* 18 Ark. 9.

Connecticut.—*New Haven Sav. Bank vs. Bates,* 8 Conn. 505 (by statute); *Philadelphia Loan Co. vs. Towner,* 13 Conn. 249. See also *Phelps vs. Kent,* 4 Day (Conn.) 96.

District of Columbia.—*Leavenworth Second National Bank vs. Smoot,* 2 MacArthur 371.

Illinois.—*Mitchell vs. Lyman,* 77 Ill. 525; *Galesburg First Nat. Bank vs. Davis,* 108 Ill. 633 overruled on other grounds in *Harris vs. Bressler,* 119 Ill. 467, 10 N. E. 188; *Willett vs. Maxwell,* 169 Ill. 540, 48 N. E. 473; *Cobe vs. Guyer,* 237 Ill. 516, 86 N. E. 1071 affirming 139 Ill. App. 592; *Maxwell vs. Willett,* 49 Ill. App. 564.

Indiana.—*Haas vs. Flint,* 8 Blackf. 67; *Cole vs. Lockhart,* 2 Ind. 631.

Kansas.—*Tholen vs. Duffy,* 7 Kan., 405.

Kentucky.—*Newell vs. National Bank,* 12 Bush 57; *Bramblett vs. Deposit Bank,* 122 Ky. 324, 92 S. W. 283, 28 Ky. L. Rep. 1228, 6 L. R. A. (N. S.) 612; *Warren De-*

posit Bank vs. Robinson, 35 S. W. 275, 18 Ky. L. Rep. 78.

Louisiana.—*Litchenstein vs. Lyons,* 115 La. 1051, 40 So. 454.

Maine.—*Ticonic Bank vs. Johnson,* 31 Me. 414.

Maryland.—*Duncan vs. Maryland Sav. Inst.* 10 Gill, & J. 299.

Massachusetts.—*Agricultural Bank vs. Bissell,* 12 Pick. 586; *Maine Bank vs. Butts,* 9 Mass. 49, 54. See also *Lyman vs. Morse,* 1 Pick. 295 note.

Michigan.—*Cameron vs. Merchants', etc. Bank,* 37 Mich. 240.

Minnesota.—*Smith vs. Parsons,* 55 Minn. 520, 57 N. W. 311 (by statute).

New York.—*Marvine vs. Hymers,* 12 N. Y. 223; *International Bank vs. Bradley,* 19 N. Y. 245; *Bloomer vs. McInerney,* 30 Hun 201; *Hawks vs. Weaver,* 46 Barb. 164; *New York Firemen Ins. Co. vs. Sturges,* 2 Cow. 664; *New York Firemen Ins. Co. vs. Ely,* 2 Cow. 678; *Utica Bank vs. Wagner,* 2 Cow. 712; *Utica Bank vs. Smalley,* 2 Cow. 770, 14 Am. Dec. 526 affirmed 8 Cow. 398; *Manhattan Co. vs. Osgood,* 15 Johns 162 (reversed on other grounds 3 Cow. 612, 15 Am. Dec. 304); *Mowry vs. Bishop,* 5 Paige 98; *Utica Bank vs. Phillips,* 3 Wend. 408; *Utica Ins. Co. vs. Bloodgood,* 4 Wend. 652; *Anderson vs. Schenck,* 1 N. Y. Leg. Obs. 107; *Fidelity Loan Assoc. vs. Connolly,* 95 N. Y. S. 576. See also *Salina Bank vs. Alvord,* 31 N. Y. 473.

North Carolina.—*State Bank vs. Hunter,* 12 N. C. 100; *Crowell vs. Jones,* 167 N. C. 386, 83 S. E. 551.

Ohio.—*Monnett vs. Sturges,* 25 Ohio St. 384; *Cook vs. Courtright,* 40 Ohio St. 248, 48 Am. Rep. 681; *Penn Mut.*

L. Ins. Co. vs. Carpenter, 40 Ohio St. 260; *Lafayette Bank vs. Findlay,* 1 Ohio Dec. (Reprint) 49, West. L. J. 321.

Oklahoma.—*Covington vs. Fisher,* 22 Okla. 207, 97 Pac. 615.

South Carolina.—*Planters' Bank vs. Bivingsville Cotton Mfg. Co.,* 11 Rich. L. 677; *Carolina Sav. Bank. vs. Parrott,* 30 S. C. 61, 8 S. E. 199; *Merchants' etc. Bank vs. Sarratt,* 77 S. C. 141, 57 S. E. 621, 122 Am. St. Rep. 562.

Tennessee.—*Wetmore vs. Brien,* 3 Head 723.

Texas.—*Webb vs. Pahde,* 43 S. W. 19; *Geisberg vs. Mutual Bldg. etc. Assoc.* 60 S. W. 478.

Vermont.—*St. Alban's Bank vs. Scott,* 1 Vt. 426. See also *Burlington Bank vs. Durkee,* 1 Vt. 399.

Virginia.—*Parker vs. Cousins,* 2 Grat. 372, 44 Am. Dec. 388; *Crump vs. Trytitle,* 5 Leigh 251; *North Carolina State Bank vs. Cowan,* 8 Leigh 238; *Stribbling vs. Valley Bank,* 5 Rand. 132.

In *Tholen vs. Duffy,* 7 Kan. 405, the court said:

> "Exacting this in advance, practically gives to the lender more than twelve per cent on the amount the borrower actually has the use of durthe time of the loan. It seems difficult upon principle to sustain such a transaction; but in cases where note or bill is given it is supported by such universal practice, that it may well be considered as ingrafted upon the law as a settled rule."

In *Wetmore vs. Brien,* 3 Head (Tenn.) 723, it was said:

> "The regular business of discounting notes, by deducting from their face the interest for the en-

> tire time they have to run, though in itself usurious—as the borrower pays interest on the amount thus deducted—has been long sanctioned by the courts, rather from necessity than upon principle."

In *Newell vs. National Bank*, 12 Bush (Ky.) 57, the court said:

> "This practice must be confined to short paper; and the instrument discounted, or upon which the interest is taken in advance, must be such as will circulate in the course of trade, or such as by statute has been placed upon the footing of that character of paper."

And in *Vahlberg vs. Keaton*, 51 Ark. 534, 11 S. W. 878, 14 Am. St. Rep. 73, 4 L. R. A., 462, it was said:

> "The courts uniformly hold, at the present day, that the interest for ordinary paper, having the usual time to run, such as is the custom of banks, may be taken in advance, by way of discount, and not subject the paper to the taint of usury."

So, that it is perfectly clear that by the express powers given to National Banks, in their charter, they are permitted to make discounts at the rate, say in Georgia, of eight (8%) per cent., per annum, by agreement, and this is not usury.

The reason why it is usury under the State law, and when done by a State Bank is because the Statutes of Georgia make discount one of the modes of effecting usury. And the case of the *Logansville Banking Company vs. Forrester*, 143 Ga., p. 302, which is the last exposition of this law of usury under the decisions in Georgia, especially on page *305*, states that the reference in the Statute to discount and exchange excludes the custom of banks in making these charges additional to interest in the loan of money, etc.

In this last named case, on pages *304* and *305*, the Court refers to a rule of law, to the effect that interest might be taken in advance on short time paper, without rendering the transaction usurious, and states "this rule of law is said to have arisen out of the custom and practice of banks." And the Court also says: "The rules and practices of banks in this regard were extended to transactions between individuals and to paper not negotiated at a bank. The extension of the custom of banks to individuals is not allowable on any proper basis of logic, and is defensible only on the principle of uniformity. In this connection it may be well to notice that our statute applies the laws of interest and usury as affecting individuals to banks, and this affords strong ground for the conclusion that banks can not engraft on the law any usage or custom of banks variant with the law of usury. Perhaps a majority of the American Courts are in line with the English decisions, and extend to individuals the same privilege of discount, as affecting the interest demanded in advance, as is allowed by the usage of banks. *But our statute expressly forbids an increase of the maximum interest rate by way of discount; and usage can not override a positive enactment of law.* In some jurisdictions statutes prohibit banks from taking any greater rate of interest or discount on any note or draft or other security than a prescribed rate, but provide that such interest or discount may be calculated and taken according to established rules of banking. In such cases it is held that the statute permits the taking of interest in advance upon loans made by a bank according to the established rules of banking."

And further on, on page *305*, after quoting Section of the Georgia Code, on the subject of discount, exchange, etc., the Court says:

"The reference to discount and exchange excludes the custom of banks in making these charges additional to in-

terest in the loan of money. The exclusion does not except short loans, and to make such an exception would be to amend and change the statute, which Courts are powerless to do."

As seen above, the Georgia law forbids "an increase of maximum rate by way of *discount,"* the Court thus recognizes *discount* as taking interest in advance.

In the case at bar, discussing the Logansville Bank case, the Court of Appeals of Georgia says: (R. p. 16.)

"In the case of *Logansville Banking Co. vs. Forrester,* 143 Ga. 302, the Supreme Court of this State holds that "the reserving of interest in advance by a bank at the highest legal rate of interest on a loan, whether it be a short or long-term loan, is usurious." We might formulate and state contentions of the plaintiff as follows: For a national bank to receive on any loan or discount more than the rate of interest allowed by the law of the State where it is located is a usurious transaction; in Georgia eight per cent. interest in advance by way of discount is by the State law usurious; therefore for a national bank in Georgia to receive eight per cent, in advance by way of discount is usurious. The contention of plaintiff is sustained by the authority of the case of *Timberlake vs. First National Bank,* decided by the Circuit Court, N. D. Mississippi, 43 Fed. Rep. 231 (3), where it was held: "Under Code Miss. 1880, which only allows interest on the amount of money actually lent, a national bank in that State can not deduct interest in advance." The ruling made in the Loganville Banking Co. case is based upon the provisions of the Georgia statute against usury, which "expressly forbids an increase of the maximum interest rate by way of discount," and in that case it is stated that "All laws respecting the rate of interest charged for the loan of money by

individuals are applicable to banks," citing Civil Code (1910), Par. 2336. Therefore the question with which we are now concerned is whether, under the authority of the national bank act as interpreted by the Federal decisions, a national bank can charge the highest rate allowed under the State law by way of discount in advance, although State banks are prohibited from so doing. Counsel for the defendant contend that they may, for the reason that while the State law specifically prohibits State banks over which it has control from thus exceeding the maximum rate by way of discount (which prohibition constitutes the basis of the decision in the Loganville Banking Co. case), the national bank act (paragraphs 5197, 5136 (7), supra), on the contrary expressly allows and permits national banks to charge the highest rate allowed under the State law by way of discount, the meaning of such authorized power to discount necessarily being to take out and reserve such interest in advance. * * *

Thus, the act of Congress relating to the operation of national banks might have authorized them to charge a rate of interest in excess of that allowed under the State law, it might have restricted the power to discount under that rate to the right existing under the laws of the State where located; or it might have conferred such power to discount under the authorized State rate, irrespective of any such authority under the State law. It was within the scope of the authority of Congress to prescribe as the penalty for usury upon national banks that which is provided under the law of the several States; or it might, as was in fact done, provide a separate and exclusive penalty, which in fact happens to be double in amount and in severity to that imposed under the law of this State. It was the opinion of the eminent trial judge who sustained the demurrer in the present case, that the act

of Congress did not adopt the State law upon the question of usury further than it relates to the rate of interest allowed by the laws of the States. In this opinion we agree. It does not appear that the Federal statute prohibits, as does the Georgia law, the discount of paper at the highest contractual rate; but on the contrary it seems to specifically authorize any national bank to "reserve * * * on any * * * discount made * * * interest at the rate allowed by the laws of the State * * * where the bank is located." (Revised Statutes, Par. 5197, supra). It will also be observed that, under the language of the seventh paragraph of section 5136, R. S. U. S., defining the powers of a national bank, discounting is specifically included. That the import of the word "discount" necessarily carries with it the charging of interest in advance is shown by what was said by the Supreme Court of the United States in the case of *Fleckner vs. Bank of United States*, 21 U. S. (8 Wheat.) 338, 351, where Judge Story speaking for the Court says: "Nothing can be clearer than that by language of the commercial world, and the settled practice of banks, a discount by a bank means, ex vi termini, a deduction or drawback made upon its advances or loans of money, upon negotiable paper, or other evidence of debt, payable at a future day, which are transferred to the bank." See also the recent case of *McCarthy vs. First National Bank*, 223 U. S. 493, 499. A distinction has sometimes been held to exist between a direct loan and a purchase and discount of commercial paper, but in the case of *Morris vs. Third National Bank*, 142 Fed. 25, 31, it was held by the Circuit Court of Appeals that no such distinction can be made; and it is there said that "the discounting of promissory notes and other evidence of debt is within the express granted powers of National Banks." Rev. Stat. U. S. Par. 5136.

And the Court further holds that that term is sufficiently comprehensive to include the acquisition both by way of purchase and by ordinary loan; quoting *National Bank vs. Johnson*, 104 U. S., 271, in which latter case it was said that "the terms, loans, and discounts, are synonyms." The Fleckner decision also holds that the taking of interest in advance in the ordinary course of business does not constitute usury. Thus the Court says (21 U. S. 354) that an authority to discount or make discounts, from the very force of the terms, necessarily includes an authority to take interest in advance. "And this is not only a settled opinion among professional and commercial men, but stands approved by the soundest principles of legal construction. Indeed, we do not know in what other sense the word discount is to be interpreted. Even in England, where no statute authorizes bankers to make discounts, it has been solemnly adjudged that the taking of interest in advance by bankers, upon loans in the ordinary course of business, is not usurious." The Fleckner case has been followed in many decisions rendered by the various judicatories of the country, State and Federal; and it must be regarded as well established that, in the absence of any statute to the contrary, similar to that of force in this State, interest may be taken in advance by way of discount, at least on short-time paper, at the highest rate allowed by law. See *Bank of Newport vs. Cook*, 60 Ark. 288, as reported in 29 L. R. A. 761, with note, Thus, while in the able opinion of our Supreme Court, as rendered by Presiding Justice Evans, it was held as the law of this State, and, as we think, manifestly correctly, that under the Georgia statute discount taken at the highest rate is prohibited as being usurious, the ruling made in that case would not apply to the powers of a national bank operating under Federal law which does not thus prohibit the taking of such discount, but on the contrary, expressly

authorizes same which practice, as thus authorized, has been declared by the Supreme Court of the United States not to be usurious. It is true that the Fleckner decision was rendered long prior to the enactment of the present national bank act; but the point is that this act as now of force authorizes *discount* at the highest rate allowed under the laws of the several States, and the ruling in the Fleckner case holds that such practice is not usurious. As regards the operation of national banks within the State of Georgia, Congress adopted the rate of interest as here prescribed, but went no further, and not only did not adopt our inhibition upon discounting at that rate, but, on the contrary, gave specific authority therefor which practice, in the absence of any such inhibition, has been held by the Supreme Court of the United States not to be usurious."

In other words, under the Georgia law of usury, "*discount*" is put in the Statute as being prohibited as being usury, whereas under the law of the United States the power to discount notes is expressly given, and the penalty is also prescribed. So, if a National Bank in Georgia discounts a note by agreement at eight (8%) per cent. interest, it is lawful for it to do so, whereas if the same thing was done by a State Bank it would be unlawful.

The learned counsel for petitioner make much of the fact that National Banks of Georgia may thus gain a slight advantage by taking discount, that is, interest in advance, when the State Banks can not do so, and contends that it is inequitable and contrary to the intention of Congress that this should be done.

We can see nothing inequitable in this as an original proposition for there are several differences between State banks and national banks.

One variance between Section *5197* and the State law is as to *exchange*. Section *5197* states that the taking of *exchange* in addition to interest is not usury.

Wheeler vs. Union National Bank, 96 U. S., p. 268.

This would be usury under State law.

Loganville case, supra.

Another difference between the statute of the State and the statute of the United States is that under the law of Georgia as it now stands the penalty for usury (Acts of 1916, page 48) is the forefeiture of the entire interest charged or taken and no further penalty or forfeiture than the entire interest shall be suffered or allowed.

Under Section 5198, if the usurious interest is paid, the penalty for usury is *double the entire interest* so that it is not inequitable that there should be the slight difference between the State banks and national banks occasioned by the specific provision of the laws of the United States allowing interest to be taken in advance.

In this connection, the Supreme Court of Georgia held in *First National Bank of Dalton vs. McEntire,* 112 Ga., 232, that a surety signing a note containing a homestead waiver, secretly tainted with usury is not discharged from liability when the note is payable to a National Bank though he would be if payable to one not a National Bank. Therefore, absolute equality is not provided.

But the Supreme Court of the United States has expressly held against the contentions of the learned counsel for the petitioner in this regard.

In *Tiffany vs. National Bank of Missouri,* 18 Wall., 409, this Court held:

"National Banks have been national favorites." Further, "it could not have been intended, therefore, to expose them to the hazard of unfriendly legislation by the States or to ruinous competition with State banks." Referring to the 30th section of the Act of June 3, 1864 (Sec. 5197, R. S. U. S.), and after having said that much has been done to insure National Banks "taking the place of State Banks," the Court says, *"It allows such banks to charge such interest as State Banks may charge, and more, if by the laws of the State more may be charged by natural persons."*

Moreover as regards all the interest except 8 per cent. in advance, and in regard to the special deposit, the Georgia Courts treated National Banks as being on footing with all other citizens of Georgia with reference to the State statutes.

The Supreme Court of United States has held that the true construction of State legislation is a matter of State jurisprudence and, while the right of national banks springs from the Act of Congress, yet it is only a right to have an equal administration of the rules established by the State law.

It does not involve a reservation to the National Courts to determine adversely to the State Courts what is the rule as to interest prescribed by State law, but only to see that such rule is equally enforced in favor of National Banks.

"The decision here was not against any equality of right, but only a determination of the meaning of the State law as applied to creditors. It therefore denied no rights given by the Federal Statute and involved no judgment adverse to plaintiff as to its meaning and effect.

It assumed that the plaintiff's interpretation of that staute was correct, and ruled nothing against it. It presents no Federal question. It is broad enough to cover this case. It was relied upon by the Supreme Court, and therefore the case is, by the settled law as heretofore announced, one which does not come within the jurisdiction of this Court."

Union National Bank vs. Louisville Railway Company, 163 U. S. 325.

Therefore, we think that the judgment of the three courts that have already passed on this point, to-wit, the Superior Court of Chatham County, the Court of Appeals of Georgia, and the Supreme Court of Georgia, that a National Bank in Georgia has a right to charge 8% in advance, though that right is denied to State Banks, should not be set aside and the judgment of the court below should be affirmed.

IV.

Only one Federal question is involved in this case.

At the end of the brief (page 15) appended to the petition for certiorari, it is submitted that the Court of Appeals of Georgia has committed error in three respects named, which should be corrected by this Court, for the dismissal of the suit means:

"1. That a petition setting forth excessive charges of interest, which was paid the lending bank by the borrowing bank, did not authorize a recovery of the penalty denounced by Congress.

2. It has held that these loans which were made at eight per cent. in advance, while usurious under the

Georgia statute, were not usurious because practiced by a National Bank.

3. It has held that enforcing a deposit of over $10,000.00 as a condition of the loans, as part of a scheme to knowingly charge usury, does not entitle the representative of the borrower to the penalty unless the borrower paid interest as such on the enforced deposit, although the borrower did pay the full amount of interest charged on the full face of the loan contract."

The Court of Appeals clearly holds that, if the petitioner had set forth a case of usury as specified under his first and third propositions, he would have been entitled to recover.

It held that he was not entitled to recover under his second proposition.

There is no part of the first and third propositions that in any way involves the construction of theActs of Congress set forth in Section 5197.

The Court clearly held that if petitioner had made out a case he was entitled to recovery under Section 5198, but, in order to recover under Section 5198, a case must be made out under Section 5197.

In other words Section 5198 merely denounces the penalty for the violation of Section 5197.

In order to recover petitioner must show a violation of Section 5197, therefore the only Federal question involved in this case is the right of a National Bank under the National Banking Act to charge 8 per cent. in advance.

We have shown, we think, in the foregoing portion of this brief that National Banks undoubtedly have such a right and this question has long been settled as has

been shown above by the settled practice of the commercial world and the decisions of the Court of last resort in the United States, including Supreme Court of United States as well as courts of England.

The decision of the Court of Appeals cites revised statutes 5197 as permitting discount or taking interest in advance, and also cites Section 5198, which gives the right to sue for twice the amount of interest actually paid, and also cites Section 5136 as including among the powers of the banks, the discounting of notes. The decision of the Court of Appeals further showed that under the decision of the case of *Loganville Banking Co. vs. Forrester*, 143 Ga. 302, the Supreme Court of Georgia had held that the act of The National Bank of Savannah in charging interest in advance, would be usury, and the Court of Appeals sought to show that The National Bank can charge the highest rate of interest allowed by the State law, by way of discount in advance, although State Banks are prohibited from so doing, holding that the Acts of Congress providing for the creation and operation of National Banks, as construed by the Federal Courts constitute ultimate and paramount authority on the subject.

The Court of Appeals cited *Hansford vs. The National Bank of Tifton,* 10th Ga. Appeals 270 and 271. The National Bank of Savannah claimed in that case that it was authorized by section 5197 to deduct interest in advance, or discount paper, and this case, in the 10th Ga. App. held that where the power or liability of The National Bank is called into question, necessarily a Federal question is involved, and consequently United States Supreme Court is the ultimate and paramount authority on the subject, and all authorities of State courts to the contrary must yield. It also cited *Reese vs. Colquitt National Bank*, 12th Ga. App. 472, which holds that State

statutes relating to usury, and prescribing penalties for charging or taking usury, have no application to negotiable instruments held by National Banks. The penalty fixed by Section 5198 of the Revised Statutes is exclusive. Said case further decides that a surety who signs a negotiable note held by a National Bank, containing a waiver of homestead and exemption, which is secretly tainted with usury, of which fact he had no knowledge at the time of signing, is not discharged from liability thereon by the exaction of usury, as his risk had not been increased since the Georgia statute declaring a waiver of homestead and exemption to be void, when it was a part of the usurious contract, can not be applied when the creditor taking or charging the usury is a National Bank. In other words, it was held that if held by a State bank, it was usury, and the surety would be relieved. In case of a National Bank, it was different.

It also cited *First National Bank of Dalton vs. McEntire,* 112 Ga. 232, which held that the penalty imposed by Section 5198 is exclusive, and the law of this State that a waiver of homestead when part of a usurious contract is void, imposes a penalty for charging usury, and therefore, not applicable to National Banks. It follows that a surety who signs a promissory note containing a waiver of homestead, and secretly tainted with usury, of which latter fact he had no knowledge at the time of signing, is not discharged from liability when the note is payable to the National Bank, as his risk has not been increased, and on pages 233 to 235 it shows that a surety in a State Bank, under the circumstances, would be relieved, while a surety in a National Bank would not be relieved.

The Supreme Court of Georgia also carefully considered these questions and their opinion is entitled to weight in this court.

The Court of Appeals of Georgia and the Supreme Court of Georgia decided correctly the only federal question involved in this case, to-wit, the right to charge interest in advance, and no other question has any bearing here and the decision of the court below should be affirmed.

V.

The special deposit involved in this case is not usurious.

The Court of Appeals on this feature of the case decided in substance that, under the allegations of the petition, the deposit was usurious, but, as the allegations of the petition did not show that any usurious interest had been paid on it, petitioner could not recover.

The Court of Appeals says, "Referring to the petition in the present suit as amended, we find no allegation setting forth the amount of usury paid by plaintiff to defendant by reason of such required deposit." (Record p. 21.)

Under the decisions of this Court, it is absolutely necessary that the amount of usurious interest paid should be alleged, in order to warrant a recovery under the provisions of Sec. 5198. See cases cited in opinion, also,

Brown vs. Marion National Bank, 169 U. S., 416.
McCarthy vs. First National Bank, 223 U. S., 493.

The Court of appeals held that the petition did not show an allegation of any payment of usurious interest so far as the special deposit was concerned, and therefore the Court of Appeals of Georgia gave the construction to Section 5198 which has been given by the Supreme Court

of the United States and therefore no federal question is involved.

It is simply a question of pleading under the Georgia law.

The respondent contends that the special deposit was not usurious for the reasons stated in the following:

The petition sets up a second branch of the charge of alleged usury, in that it states that there was an understanding and agreement between The National Bank of Savannah and The Citizens & Screven County Bank, at the time of making the said loans, that The Citizens & Screven County Bank should, while it was a borrower, keep on deposit with The National Bank of Savannah at least the sum of $10,709.31, "which could only be used towards the payment of said indebtedness," and that The Citizens & Screven County Bank kept this deposit there, whereby it lost interest at seven (7%) per cent, being Fourteen Hundred and Ninety-nine dollars and Thirty cents ($1,499.30).

We respectfully submit that this was no taking of interest in the way of usury. The taking of interest in the way of usury can only be effected when it is compulsory by the contract. In this case it was not compulsory, because this amount of Ten Thousand Seven Hundred and Nine Dollars and Thirty-one Cents ($10,709.31), could have been used towards the payment of the indebtedness, in which event the indebtedness could have been reduced that much, and the interest or discount at the rate of eight (8%) per cent, per annum, would to that extent have been paid or saved.

This contract, as set out, meant that The Citizens & Screven County Bank should pay in to The National Bank of Savannah, at least that much money on account

of the indebtedness, and if they did not pay it on account of the indebtedness, it should remain with the bank as security.

In other words, that bank, instead of paying this amount of money on the indebtedness, preferred to let it stand as a deposit, without interest, as security for its financial indebtedness to The National Bank.

There can be no case found in the books where usury results from a loss of interest, or the payment of more interest by the voluntary act of the debtor where the debtor had the clear right to have avoided its loss of interest, or the accrual to the creditor of any interest.

By the very language of the petition this deposit of $10,709.31 is either a special deposit, because it was put in only to be used towards the payment of said indebtedness, or a specific deposit, as it is sometimes termed in the books, or a deposit in the nature of a special deposit. That is, it was a deposit of a sum of money to be held by the bank only to be used in the payment of the indebtedness, which meant, of course, the principal of the indebtedness.

Under all the books of banking so far as we have been able to find, such a deposit is entirely distinguishable from a general deposit; in the case of the latter deposit there is the relation of debtor and creditor and the money becomes the property of the bank, whereas in the case of a special or specific deposit, the money remains the property of the depositor. It does not in any sense become a part of the bank's general assets.

The New York Court, speaking through *Judge Rapallo,* in 36th American Reports, p. 582, especially on page 588, states that a reference to the history of banking discloses that the chief deposits received by the early banks were

special deposits of money, bullion, plate, etc., to be specifically returned to the depositor when the terms of the deposits were fulfilled, and this decision, being in the case of *Patterson vs. Syracuse National Bank,* on page 588, refers to the business done in special deposits by the Bank of Venice (the earliest bank), and the old bank of Amsterdam, and the Bank of England.

In *Corpus Juris,* 7th volume, p. 630, under the head of "Banks and Banking," a distinction is made between special deposits, p. 630, and "deposits for specific purposes" on pages 631-632, and it states, as to the latter, "a deposit may be for a specific purpose as where money, or property is delivered to the bank for some particular designated purpose, money to pay a particular note or draft, etc. While such a deposit is sometimes termed a special deposit, and partakes of the nature of a special deposit to the extent that title remains in the depositor, and does not pass to the bank, yet it seems more accurate to look on this as a distinct class of deposit. In using deposits made for the purpose of having them applied to a particular purpose, the bank acts as the agent of the depositor, and if it should fail to apply it at all, or should misapply it, it can be recovered as a trust deposit."

And in the notes down below it is stated that the term "specific deposit" has been applied to such deposit.

And, again, it is stated in the notes that a deposit on a contingency may be received by a bank and not paid out until the happening of contingency, referring to the case of *American National Bank vs. Presnall,* 58th Kansas, p. 69; 48th Pacific, p. 556.

In *American-English Enc. of Law,* volume 3, page 822, it is stated as to deposit for specific purposes that the bank accepting the trust may not violate it by applying

the moneys to any other purpose, even to the payment of a debt owing to it and already past due. Such deposits are sometimes termed special deposits, the title continuing in the depositor instead of passing to the bank, and the depositor retaining the right to a preference in case the bank fails as for a special deposit.

In other words, this $10,709.31 could not have been used by The National Bank of Savannah in the payment of any debt of the Citizens & Screven County Bank to it other than "the said indebtedness." The National Bank of Savannah could not put this sum of $10,709.31 into its liabilities as money on deposit, but the bank held this sum as special deposit, the title being in the depositor—the depositor not being allowed to check it out, and not to be applied by the depositor for any purpose, except to pay its indebtedness to that extent. Therefore, of course, it could bear no interest, because the bank was not indebted for this sum of money, and it could not in any sense be liable for interest upon the depositor's money, to wit, this special deposit.

The following cases are expressly in point that this is a special deposit:

"A fund which comes into the possession of a bank with respect to which the bank has but a single duty to perform, and that is to deliver it to the party thereto entitled, is a trust fund and is therefore incapable of being commingled with the general assets of such bank subsequently transferred to its receiver."

Capital National Bank vs. Coldwater National Bank, 49 Neb. 786, 69 N. W. 115.

See also

Montagu vs. Pacific Bank, 81 Fed. 602.
Moreland vs. Brown, 86 Fed. 25 (9th C. C. A.)
Officer vs. Officer (Iowa), 90 N. W. 826.

"Where owner of savings account informed cashier that draft deposited was for purpose of paying contractor for building house and refused to let it be credited to her account, whereupon the cashier gave her a special receipt bearing the words 'Sp. Dept.' the deposit was a special deposit, and the money was charged with a trust in favor of the contractor, and the bank did not take title to the proceeds of the draft."

Sawyer vs. Conner, 75 So. (Mississippi), 131.

See cases cited: The standard in such case is quoted in the last named case from Vol. 7, Corpus Juris p. 632, Banks and Banking.

"In using deposits made for the purpose of having them apply to a particular purpose, the bank acts as an agent of the depositor, and if it should fail to apply it at all, or should misapply it, it can be recovered as a trust deposit."

Who can doubt that, under the allegations of the petition, if the National Bank had applied this deposit otherwise than as alleged that it would have been liable for the perversion of a trust fund?

"A bank to which a depositor is owing a matured indebtedness may appropriate a general deposit of the debtor to a discharge of the debt; but it has no such right where a deposit is made for a special purpose or under a special agreement."

Smith vs. Sanborn State Bank, 147 Iowa 640, 126 N. W. 779.

The following extract from that decision shows how nearly its facts and how absolutely its principles apply to the case at bar.

"The evidence shows without dispute that the check for $200 was placed with the defendant upon the express

agreement and understanding that, after paying certain specifically named debts, the remainder would be repaid to the plaintiff on the following day or whenever called for to enable him to take his wife to the hospital for needed treatment."

This was held a special deposit. See also
Titlow vs. Sundquist, 234 Fed. 613, 9th C. C. A.

The Screven County Bank had a perfect right to apply this money to the payment of "said indebtedness," and it was the only common sense thing that bank could do, namely, to apply it on that indebtedness at once, and in this way reduce its indebtedness to The National Bank of Savannah. The attempt of the petitioner in this petition to allege a specific deposit, a sum put in to be paid for only one purpose, and then charge The National Bank of Savannah with interest on it, fails. The National Bank of Savannah can only be liable for interest on money when the money becomes its property, and when the money can be used for all purposes of the bank; that is to be paid out generally, and not particularly for one purpose only. The word *only* in said petition in this regard is very significant, and very compelling in the construction of the petition.

And again, in *American-English Enc. of Law*, volume 3, page 824, the law is laid down that the bank which receives a deposit to apply to the payment of a designated debt can not escape liability by applying it to some other indebtedness. In the present case The National Bank of Savannah did not receive this deposit with the right to apply the same to the payment of any indebtedness—but it received the deposit "which could only be used towards the payment of said indebtedness," which means, of course, could only be used by the Screven County Bank "towards the payment of said indebtedness."

The National Bank of Savannah did not have a banker's lien, giving it the right to apply this deposit to the extinguishing of the depositor's general indebtedness, because that grows out of the doctrine that the relationship between the bank and depositor is that of debtor and creditor, but the bank did have a right to hold on to this deposit and to see to it that the Screven County Bank did not use it in any way except as a payment on this indebtedness.

For these reasons the Supreme Court of the United States has held in the case of *Reynes vs. Dumont*, 130 U. S., p. 355, that a bank holding a deposit of securities or property to secure one particular debt can not hold the same to make good a general balance due by the customer, but only has the right to hold such special deposits for the particular debt which they were to secure.

In the decision of the Court of Appeals, which is here complained of, the 5th headnote (made by editors) is as follows:

"Banks and banking, 'deposit for a specified purpose.' A deposit for a specified purpose is one in the making of which a trust fund is constituted with respect of which a special duty as to its application is assumed by the bank."

Cooper et al vs. National Bank of Savannah, 94 S. E. Rep., page 612.

In other words, the special duty as to its application, assumed by the bank, was simply to hold the same until the Citizens & Screven County Bank applied it, and of course there would be no interest pending such action by the Citizens & Screven County Bank, and hence, of course, no usury charged or paid, under Section 5198. As to this deposit for a specified purpose, reference is hereby made to the original petition in this case, which

is part of the record, and the Court will see by referring to it, that this sum of $10,709.31 *is not alleged to have been deducted from any loan made by The National Bank to the Citizens & Screven County Bank, and therefore, it is not a part of any loan*, but the Citizens & Screven County Bank simply deposited this $10,709.31 for a specified purpose, taking the same from its general funds.

This amount of money, therefore, is not to be considered on the question of usury, but simply is to be regarded as a deposit for the specified purpose, as to which The National Bank of Savannah assumed a trust relation, that is to say, to hold the same for the Citizens & Screven County Bank until it applied the same to the debt, and can in no wise be regarded as playing any part in the usury question.

The Court of Appeals did not follow our contention, and we state it merely to show that, whether under the decision of the Court of Appeals or under our contention, there can be no Federal question involved so far as the special deposit is concerned.

As held by the Court of Appeals, counsel has not plead the case in such a way as to warrant a recovery under Georgia law.

The Court of Appeals says in this regard (R. p. 21):

"On the contrary the original averment setting forth the amount of such usurious payment has been stricken by plaintiff, for the reason, as stated in the brief of its counsel, that 'The interest on that amount, while lost to the plaintiff, was not *paid* to the defendant.' In other words, the plaintiff can not recover, under the statute, for interest lost, but for *usury paid;* and while the requirement of the deposit, on the conditions named was

really in itself a usurious transaction, the plaintiff could not recover the penalty computed on that amount."

Surely the Court can not have erred in holding that counsel stated his own contentions correctly.

As we will show later herein, counsel has now changed his ground.

As we will show hereafter, this Court will follow the Georgia courts in the construction of its State statute on pleading.

Therefore, there is nothing in the special deposit in this case to authorize a reversal of the decision of the Courts below.

VI.

The usury, alleged in this case, is not so pleaded as to warrant a recovery.

Under the laws of Georgia both in a suit for usury and in a plea setting up usury, the usury must be pleaded with particularity.

This is set up by Section 5674 of the Code and also by several decisions of the Supreme Court of Georgia.

That section reads as follows:

> "The plea of usury must set forth the sum upon which it was paid or to be paid, the time when the contract was made, when payable *and the amount of usury agreed upon, taken or reserved.*" (Italics ours.)

"A plea of usury should distinctly set out the usury, its amount, date and time."

Tillman vs. Morton, 65 Ga., 386.

"The plea of usury is one regulated by special legislation. Such a plea must be complete within itself, and set forth the sum upon which the usury was paid, or to be paid, the time when the contract was made, when payable, and the amount of usury agreed upon, taken or reserved."

Trammell vs. Woolfolk, 68 Ga., 628, h. n. 1.

"In looking into the record, we concur, with the Court below, that the evidence as to usury was too indefinite and uncertain as to the amount on which the usury was reserved, the time for which it was reserved, and the rate per cent. charged, upon which a defense could legally rest. To say there was so much usury in amount reserved on a contract, is not sufficient. Amounts, dates, rate per cent. and the time of the maturing of said contracts, should be shown with such certainty as is required in such pleas by Section 3419 of the Code of 1868, so as to furnish the data to the Court and jury upon which to predicate their findings in such a case."

Laramore vs. Bank, 69 Ga., 722.

and the Court says this applies also to a suit to recover *back usury paid.*

"The purpose of this statute is to require the defense of usury to be so pleaded that the amount that is sought to be recovered or set off may be determined accurately from the allegations in the plea, without aid from extraneous sources. Any defect, therefore, in such a plea which would prevent the determination of the amount would be a defect in substance, and can be taken advantage of by a general demurrer in writing, or an oral motion to strike."

Burnett vs. Davis, 124 Ga., 541, 543.

Culver vs. Wood, 138 Ga., 60.

The following is also conclusive:

"A plea of usury must set forth the sum upon which it was paid or to be paid, the time when the contract was made, when payable, and the amount of usury agreed upon, taken, or reserved. A plea which fails to comply with the statute is fatally defective. Civil Code (1910) 5674; Burnett vs. Davis, 124 Ga., 541 (52 S. E., 927). *A similar degree of specification is required where it is sought by an independent action to recover usury alleged to have been paid by a debtor to a creditor."*

Lee vs. King, 142 Ga., 609, h. n. 1.

"The essential requirements of a plea of usury, where the usury is sought to be recovered back or set off, being prescribed by statute, any defect in such a plea which results in a failure to comply with the statutory requirements is a defect in substance, and may be taken advantage of by a general demurrer in writing or an oral motion to strike.

Burnett vs. Davis, 124 Ga., 541 (52 S. E., 927) Civil Code (1910), Sec. 5674."

King vs. Moore, 147 Ga., 43.

The suit of the plaintiffs for usury in this case is defective in the following particulars: The true basis of calculating maximum interest is 8 per cent. in advance on the amount of the loan, but the plaintiffs claim that the amount of usury is the difference between the amount actually charged and eight per cent in advance not on the face of the note but on the amount of note after deducting the amount of interest reserved, therefore, the entire basis of usury is defective and the usurious amount is not correctly stated in any case; as we have seen in the decision in 124 Ga., 543, this could be taken advantage of by general demurrer or motion to dismiss, but in the case at bar the point is made not only by gen-

eral demurrer but by special demurrer. In the second ground of demurrer (Record p. 10), it is alleged *"that usury is not set forth with sufficient particularity."* At the end of third ground of demurrer it is alleged *"that the alleged schedule of usury is defective, in that it does not calculate interest on the face of the note but interest on the amount alleged to be actually loaned."*

The fourth ground of demurrer (Record p. 11), is that the allegations that the defendant knowingly, took, received and charged the said Citizens & Screven County Bank a rate of interest greater than is allowed by law are incorrect and insufficient in that the exhibit referred to does not show whether or not the amount charged is in excess of eight per cent per annum in advance on the face of the note. A similar ground of demurrer was substantially repeated in the fifth ground of demurrer.

The seventh ground of demurrer again repeats this.

In other words, usury is not in any single item properly calculated and the amount of usury is not correctly stated in any transaction. Under these circumstances we think it clear that the demurrer should be sustained not only on the general ground, but on the special grounds stated, because the statute specifically requires the stating of *"the amount of usury agreed upon, taken, or reserved."*

Nor are the allegations with reference to the special deposit of $10,709.31 sufficiently specific under the provisions of the statute in this case as set forth in Section 5674 of the Code.

In other words, it is not shown how much usury, if any, resulted from the deposit in this case.

The mere allegation, that a transaction is a scheme and device to cover up and reserve more interest than allowed by law, to-wit: eight per cent per annum, and therefore the whole transaction was usurious, is not sufficient under this statute.

A case which is exactly in point on this subject, has been decided by the Court of Appeals of Georgia, to-wit:

Sullivan vs. Rich, 18 Ga. App., 301.

which was a case in which the defendant set up the plea of usury to a suit by the plaintiff, and the plea, after setting out certain features of the transaction in reference to a loan, continued, "the said transaction was a scheme and device to cover up and exact and reserve more interest than allowed by law, to-wit, 8 per cent per annum, and therefore the whole trade aforesaid was null and void, and the said note and the bond for title are void."

The Court held "The defendant's answer to the suit was in effect a plea of usury, and was insufficient in law, and was properly stricken on demurrer, the answer not setting forth the elements required by section 5674 of the Civil Code of 1910."

We think this is absolutely controlling in the case at bar.

We will note hereinafter the effect of this statute with reference to the pleading of usury in Georgia on the amounts which petitioner alleged were taken by The National Bank of Savannah as interest in excess of 8 per cent in advance, and also with reference to special deposit.

We call to the attention of this Court that the Court of Appeals of Georgia specifically held that the usury was not properly pleaded in this case. The Court of Appeals construed the petition to mean that so far as the special deposit was concerned that there was no allega-

tion setting forth the amount of usury paid by plaintiff to defendant by reason of such required deposit. It held that *"a cross action for the statutory penalty against the bank for taking usurious interest cannot be maintained where the plea of usury fails to give the amount of usurious interest paid.* (Record p. 21.)

Therefore, the Court of Appeals of Georgia and the Supreme Court of Georgia have both held in this case that the usury was not only not good statutory pleading under the law of the United States, but also not good under the law of Georgia.

The Supreme Court of United States will follow the State courts in the construction of their own statutes.

"A construction of State statutes by the court of last resort of the State will be followed by this Court."

Noble vs. Georgia, 168 U. S., 398.

See also

Old Colony Trust Company vs. Omaha, 230 U. S., 100.

Counsel for petitioner in his brief (pp. bottom 16, top 17) in effect admits that he has not complied with this statute which he seems to think is difficult to comply with in this case. Not having complied with it, he cannot recover.

Pleading is certainly a matter of local law, therefore, there is nothing so pleaded by the plaintiff as to warrant a recovery of usury under the law of Georgia.

VII.

Contentions of the petitioner.

In his petition, Counsel for the petitioner emphasizes the fact that he is entitled to recover in this case because in several instances the discount collected exceeded 8 per cent in advance.

We have shown in the foregoing portion of this brief (under point VI) that the petitioner has not pleaded usury under the Georgia law in such a way as to authorize a recovery.

In other words, he has in each case stated the usury at a larger amount than it could possibly have been because he has charged that all is usury that exceeds 8 per cent interest on the amount actually loaned after deducting the discount.

Under the statutes, as construed by the courts of the State of Georgia, which we have shown this Court will follow, this does not afford the petitioner a ground for recovery.

In his brief in the Court of Appeals, counsel did not take the position that the special deposit made each of the loans usurious, but if we admit for the sake of argument that his brief did take that position, and if we admit for the sake of argument that the special deposit is usurious in neither event was the usury properly pleaded. As we have shown, the authorities already cited to the Court require that the plea of usury should distinctly set out the usury, its amount, date and time.

NOWHERE IS IT SPECIFIED HOW MUCH USURIOUS INTEREST WAS CHARGED OVER AND ABOVE THE 8 PER CENT IN ADVANCE ON THE FACE OF ANY LOAN.

NOWHERE IS IT CHARGED HOW MUCH USURIOUS INTEREST WAS CHARGED ON ANY LOANS BECAUSE OF THE USURIOUS DEPOSIT, SO THE USURY WAS NOT PLEADED PROPERLY UNDER THE GEORGIA LAW.

As will be seen from the statement of the case set out in the earlier portions of this brief, the point that these amounts of usury were not properly alleged is covered in the 6th and 7th grounds of the demurrer, the 2nd, 3rd, 4th and 5th grounds of demurrer also specifically dealt with this subject so that the point was made in the pleading. (Record pp. 10, 11.)

None of the calculations on page 4 of the brief of the petitioner are correct because none of them are based on the face of the loan as the principal and that is the only correct principal, but even on his own statement more than half of them charge less than 8 per cent. See loans 4 (charged by him in line last but one, page 4, as being over 8 per cent, but being put down as .0788) 9, 10, 11, 12 (14 is only 8 per cent plus, too small to figure apparently), 15 to 23 inclusive. Nowhere has counsel undertaken to say what amount the special deposit caused to be paid as interest and under the laws of Georgia, it is not properly pleaded.

Sullivan vs. Rich, 18 Ga. App., 301, cited supra.

The argument contained on pages 8 and 9 of his brief showing the viciousness and absurdity of lending money and taking the interest in advance is very ingenious, but it can have no weight.

We do not think that the argument of counsel, which relates to the reasonableness of such a practice, can have any weight against the strict and absolute provisions of the laws of the United States as enacted by Congress.

Under the provisions of Section 5197 of the Revised Statutes where no rate of interest is prescribed by the law of the State where The National Bank does business, The National Bank has a right to charge 7 per cent interest in advance, the wording being as follows: "Such interest may be taken in advance reckoning the days from which note, bill, or other evidence of debt has to run." Therefore, we do not see that the argument of counsel can have any weight against the express provision of the law, which has been decided to be constitutional.

We think the Court may safely trust the reasonableness of the laws to Congress rather than to counsel, in as much as the statute expressly permits discount, which is taking interest in advance.

Furthermore in the illustration by Counsel, interest was taken on the face of loan, then on that interest. No such practice is alleged in the case at bar.

The law of Georgia is express in allowing interest at 8 per cent and under the statute of the United States, the lender may discount at that rate, which is allowed by law. If it cannot discount at that rate then it is deprived of a right allowed by law.

Brief pages 10 and 11 of respondent's brief in terms says it can only "discount" (that is, take in advance) at .0742. He thus deprives it of a right given by the laws of the United States.

Now as will be seen by an inspection of the record (pp. 12, 13) the case was dismissed on the demurrer

and the dismissal of the petition by the Superior Court of Chatham County was sustained by the Court of Appeals of Georgia and by the Supreme Court of Georgia. (Record pp. 14, 23.)

When a case is dismissed on demurrer, the Court sustains *the entire demurrer upon all the grounds, general and special.*

This is well settled in Georgia, as will be seen from the following:

"Where a demurrer to a petition contained several grounds, some going to the merits and some special, and the Court sustained the demurrer and dismissed the petition, there is no presumption that the ruling was based on the special grounds of the demurrer rather than the general, but the judgment will be treated as sustaining the entire demurrer upon all grounds. *Gunn vs. James,* 120 Ga., 482 (48 S. E., 148); 1 *Freeman on Judgments* (4th ed.), Sec. 276-a; *Carr vs. Trustee of Emory College,* 32 Ga., 557; *Dodson vs. Southern Railway Co.,* 137 Ga., 583 (73 S. E., 834); *Moor vs. Farlinger,* 138 Ga., 359 (75 S. E., 423)."

DeLoach vs. Georgia Co., 144 Ga., 678, h. n. 1.

Therefore, the judgment in this case sustained *all the grounds of special demurrer in the case.*

This alone is sufficient to authorize the dismissal of this case.

Hammond vs. Johnson, 142 U. S., 73.

THIS COURT WILL NOT INTERFERE WITH THE JUDGMENT OF THE COURT BELOW ON A FEDERAL QUESTION WHEN THE JUDGMENT CAN BE SUSTAINED ON OTHER GROUNDS.

As the judgment in the case at bar can be sustained on the ground of defective pleading, which is a non-Federal question, this Court will not interfere.

The only case cited by the plaintiff in error, which is at all in point on the proposition that a National Bank has no right to charge in advance the highest rate allowed by the State law, is *Timberlake vs. First National Bank*, 43 Federal Reporter, 231 (3). We do not think that this case should control the case at bar in favor of the plaintiff at bar because:

First. It is a case only by a Circuit Court of the United States.

Second. It is directly in conflict with the decisions already cited, such as *Fleckner vs. Bank*, 8th Wheaton, 338; *Dearing vs. Bank*, 91 United States, 29, and other numerous decisions of this and other courts.

That decision was rendered in the Circuit Court of Mississippi in 1890, and was not carried up. It appeared that the law of Mississippi was that 10 per cent per annum could be charged, *if contracted for in writing*, which was not done in the Timberlake case for the whole period, and therefore, *there was usury*. The Court, on page 235, referring to the Code of Mississippi, states that the Code of 1880 only allowed interest on the amount of money actually loaned, and does not allow it retained in advance. The Court proceeds to say "*as is provided in The National Bank law, where no rate of interest is fixed by the State statute,*" the judge makes the same mistake here as is made by counsel for plain-

tif in error in the Court of Appeals. They contended in that court, in their reply brief, that Section 5197 allowed the bank to retain interest in advance, only in cases where the State law had not fixed the rate of interest, and that the language in the statute *"such interest may be reserved or taken in advance"* referred to the interest mentioned in the clause next preceding, that is to say, where the State law has not fixed the rate of interest, and counsel for the plaintiff in error, as well as Judge Hill, blundered, as is clearly shown by the case of *Farmer's National Bank vs. Dearing*, 91 U. S., pages 32 and 33. There was no excuse for Judge Hill making this error, because he decided this case in 43 Fed. Rep. in 1890, while the Supreme Court had decided the case of Farmers National Bank against Dearing, in 1875. We submit, therefore, that this decision is no authority for the petitioner, and need not be further discussed, as it was only a dictum.

The plaintiff in error cites cases to show that the construction by the State Court of its law is conclusive on the question that the rate allowed by the State statute does apply.

We respectfully submit that the question before the Court is a construction of the United States statute, and not of a State Statute; all that is involved in the State statute is the naming of the rate of 8 per cent, and the United States law authorizing a discount at that rate necessarily implies that the interest may be taken in advance, and we do not see that the construction of the State Supreme Court, that the statute of Georgia prohibits reserving interest in advance can in any way militate against the law of the United States, which allows reserving interest in advance by way of discount. These remarks apply to the case of *Citizens National*

Bank vs. Donnell, 195 U. S., 374, where the only question was as to compounding interest under the law of Missouri, and not the construction of the United States statute. No question of compounding interest is involved in the case at bar.

There the court followed the Missouri courts in their construction of the Missouri statute as to compounding, but here is a construction not of the Georgia statute but of the United States statute.

We do not see anything in the case of *Daggs vs. Phoenix National Bank,* 177 U. S., 549, 555, to indicate that the Court intended to say that where the State law did not allow a charge in advance that it was not permissible by the United States law. The word "allow" simply referred to the rate of interest and does not prohibit the charging of it in advance. In that case The National Bank gained, as the Supreme Court of the United States would not consent to National Banks getting less than a State Bank.

We think that the decision of the Court of Appeals of Georgia in this case, affirmed by the Supreme Court of Georgia, which recognizes the supremacy of the United States Statutes, amply disposes of these cases, if authority on the subject is needed.

The case of *Talbot vs. First National Bank,* 185 U. S., 172, is relied on by counsel for petitioner, but it seems to us it is authority for respondent.

It says "Section 5197 authorizes a National Bank to charge the rate of interest fixed by the laws of the State in which the bank is doing business."

The decision also decides that no interest can be recovered back unless it is paid. In the case at bar, it

is not shown that any illegal interest was paid, therefore no amount can be recovered back.

In passing it may be noted that the case of *Dawson vs. Real Estate Bank*, 5 Ark., 283, relied on by petitioner on special deposit specifically holds that (stockholder) borrower "must pay the interest annually in advance."

The remarks on special deposit in that case and *Otis vs. Gross*, 96 Ill., 612 are only dicta.

The following cases show clearly that the deposit involved in this case is a special deposit.

Moreland vs. Brown (9th C. C. A.) 86 Fed., 257.

Montague vs. Pacific Bank, 81 Fed., 602.

Officer vs. Officer (Iowa), 90 N. W., 826.

Capitol National Bank vs. Coldwater National Bank, 49 Neb., 786, 69 N. W., 115.

~~*Moreland vs. Brown*, 90 N. W. (Iowa), 826.~~

Sawyer vs. Conner, 75 So. (Miss.), 131.

Smith vs. Sanborn State Bank, 147 Iowa, 640. 126 N. W., 779.

Tilton vs. Lundquist, 234 Fed., 613, 9th C. C. A.

In the conclusion of his brief in the Court of Appeals, the learned counsel for petitioner says: "That we are entitled to have a jury pass upon the question, is the claim of the plaintiffs, who have prosecuted this writ of error to reverse a judgment that does not seem to have a single authority to support it."

We think we have shown by the mass of authorities cited in this brief that counsel's assertion was erroneous when made, but, whether erroneous then or not, it is

certainly erroneous now, because we have our case supported by two very high authorities, to-wit, the Court of Appeals of Georgia, and the Supreme Court of Georgia.

The judgment of the Court below should be allowed to stand.

In this connection we wish to call to the attention of the Court the following on Page 15 of petitioner's brief in the Court of Appeals:

"There is no question of practice involved. The sole question is, that under the facts as pleaded by the petitioner, the State Court has construed 5197, 5198 R. S. to mean that a National Bank can take more interest than is allowed by law, by charging a greater rate of discount than is allowed by that law."

We submit, therefore, that The National Bank of Savannah gained this case in the trial court upon a demurrer, and it was carried to the Court of Appeals as an Appellate Court, and there the case was affirmed; it decided that The National Bank of Savannah, in charging a discount of 8 per cent in advance, had done what the law authorized it to do; that whether, under the State statute, this was permitted to be done, or not, was not the question.

That a writ of certiorari was souught from the State Supreme Court, the applicant alleging error in this holding, and the State Supreme Court after full consideration, denied the writ of certiorari.

We respectfully submit that the controlling question in this case is the right of The National Bank of Savannah, as a *National* Bank to charge 8 per cent in advance and that this was clearly a right given to it by the acts

of congress on the subject and this court will follow its own decisions and the decisions of a large majority of the courts of the United States in declaring that the National Bank had such a right. All the other points involve points not involving Federal questions and on these points, this Court will follow the Supreme Court of Georgia and the Court of Appeals of Georgia.

The decision of the Court below should be affirmed. All of which is respectfully submitted.

JACOB GAZAN,
EDWARD S. ELLIOTT,
Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

Thomas J. Evans, Sole Surviving Receiver of the Citizens & Screven County Bank,
Petitioner,

vs.

The National Bank of Savannah,
Respondent.

No. 67

ON REVIEW FROM THE COURT OF APPEALS OF GEORGIA, WRIT OF CERTIORARI HAVING BEEN GRANTED

REPLY BRIEF AND ARGUMENT OF COUNSEL FOR PETITIONER

FREDERICK T. SAUSSY,
Counsel for Petitioner.

BRAID & HUTTON, INC., PRINTERS, SAVANNAH, GA.

SUPREME COURT OF THE UNITED STATES

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No. 67

ON REVIEW FROM THE COURT OF APPEALS OF GEORGIA, WRIT OF CERTIORARI HAVING BEEN GRANTED

REPLY BRIEF AND ARGUMENT OF COUNSEL FOR PETITIONER

As Counsel for the National Bank in their statement of the case, do not controvert the statements made by the Counsel for Petitioner in his statement of the case, wherein specific and excessive discounts are shown to have knowingly been made, charged and received, under rule 21 (3) of this Court, we conclude that our statement in that respect is admitted.

Respondent

Counsel for the ~~Petitioner~~ do not completely nor accurately state the question before the Court on page 2 of their brief, in which they state that the only question before the Court is whether a national bank in Georgia may take interest in advance at the highest rate allowed by the State, where national banks are permitted to discount at the rate allowed by the law of the State where it is located.

Federal

THAT IS NOT AN ACCURATE STATEMENT OF THE QUESTIONS BEFORE THE COURT.

THE QUESTIONS BEFORE THIS COURT, ARE WHETHER THE FOLLOWING CHARGES BY WAY OF DISCOUNT BY A NATIONAL BANK IN GEORGIA ARE USURIOUS, AND IF USURIOUS, AND AS THEY WERE PAID THE NATIONAL BANK BY THE BORROWER, DOES A FORFEITURE OF TWICE ALL INTEREST PAID RESULT, TO-WIT: (The figures in brackets refer to the transactions by number in their order on Exhibit A of Transcript.)

(1) Is the charge of $109.73, discount on a 90-day note for $5,000.00 usurious, where interest for that period, calculated at even 8 per cent. per annum, could not exceed $100.00?

(2) Is the charge of $1,545.20, discount on a $75,000.00 note for 90 days usurious, where interest for that period, calculated at even 8 per cent. per annum, could not exceed $1,500.00?

(3) Is the charge of $1,318.90, discount of a $63,925.84 note for 90 days usurious, where interest for that period, calculated at even 8 per cent. per annum, could not exceed $1,278.51?

(5) Is the charge of $36.24, discount of a 90-day note for $1,500.00 usurious, where interest for that period at 8 per cent. per annum could not exceed $30.00?

(6) Is the charge of $138.90, discount on a 124-day note for $5,000.00 usurious, where interest for that period at 8 per cent. per annum could not exceed $137.77?

(7) Is the charge of $101.15, discount on a 90-day note for $5,000.00 usurious, where interest for that period, at 8 per cent. per annum, could not exceed $100.00?

(8) Is the charge of $101.11, discount on a 90-day note for $5,000.00 usurious, where interest for that period at 8 per cent. per annum could not exceed $100.00?

(13) Is the charge of $478.86, discount on a 30-day note for $63,972.49 usurious, where interest for that period at 8 per cent. per annum could not exceed $424.81?

FOR IN ALL OF THESE TRANSACTIONS, DELINEATED ON EXHIBIT "A," PAGE 5, of the TRANSCRIPT, such excessive discounts were charged and paid, and the National Bank admits the same on demurrer.

These transactions were certainly overlooked by every judge who happened to pass upon this case. For every judge seemed to be satisfied that the petition and exhibit only charged the taking by discount of EIGHT per cent. in advance, calculated on the full amount of the note; ignoring the excessive discounts, which were more than eight per cent. in advance.

IT WILL BE NOTED THAT WE HAVE NOT IN THE ABOVE ANALYSIS SET FORTH ALL OF THE TRANSACTIONS. THIS FOR THE REASON THAT THE REMAINING TRANSACTIONS COMPLAINED OF CONSISTED OF DISCOUNTS LESS THAN AT EIGHT PER

CENT. PER ANNUM IN ADVANCE CALCULATED ON THE NOTE, BUT MORE THAN ALLOWED BY GEORGIA LAW, FOR GEORGIA LAW ONLY PERMITS INTEREST TO BE CALCULATED ON THE NET AMOUNT THAT MIGHT BE AVAILABLE TO THE BORROWER, WHERE INTEREST BY WAY OF DISCOUNT IS TAKEN IN ADVANCE.

THEREFORE, WE STATE THAT THE SECOND QUESTION BEFORE THE COURT IS:

(4) Is the charge of $295.86, discount on a 90-day note for $15,000.00 usurious, where interest in advance under Georgia law could not be more than $277.80, being at .07408 per cent., which is the discount rate in Georgia, if the lender desires to charge interest at the highest rate allowed by law IN ADVANCE?

And without repeating so many words, we continue this second proposition with these statements:

(9) The discount charged on the 9th loan was $359.01, whereas the interest on $18,000.00 at .07408 per cent. per annum for 90 days is $333.36.

(10) The discount charged on the 10th loan was $99.73, whereas the interest on $5,000.00 for 90 days at .07408 per cent. per annum is $92.60.

(11) The discount charged on the 11th loan was $98.62, whereas the interest on $5,000.00 for 90 days at .07408 per cent. per annum is $92,60.

(12) The discount charged on the 12th loan was $197.26, whereas interest on $10,000.00 for 90 days at .07408 per cent. per annum is $185.20.

(14) The discount charged on the 14th loan was $66.67, whereas interest on $5,000.00 for 60 days at .07408 per cent. per annum is $61.73.

(15) The discount charged on the 15th loan was $98.62, whereas interest on $5,000.00 for 90 days at .07408 per cent. is $92.60.

(16) The discount charged on the 16th loan was $1,479.45, whereas interest on $75,000.00 for 90 days at .07408 per cent. per annum is $1,389.00.

(17) The discount charged on the 17th loan was $78.90, whereas interest on $4,000.00 for 90 days at .07408 per cent. per annum is $74.08.

(18) The discount charged on the 18th loan was $98.62, whereas the interest on $5,000.00 at .07408 per cent. for 90 days is $92.60.

(19) The discount charged on the 19th loan was $29.92, whereas the interest on $1,500.00 for 90 days at .07408 per cent. per annum is $27.78.

(20) The discount charged on the 20th loan was $78.90, whereas the interest on $4,000.00 for 90 days at .07408 per cent. per annum is $74.08.

(21) The discount charged on the 21st loan was $39.45, whereas interest on $2,000.00 for 90 days at .07408 per cent. per annum is $37.04.

(22) The discount charged on the 22nd loan was $197.26, whereas interest on $10,000.00 at .07408 per cent. for 90 days is $185.20.

(23) The discount charged on the 23rd loan is $295.86, whereas interest on $15,000.00 for 90 days at .07408 per cent. is $277.80.

The third Question before the Court is, that even with all the discounts charged, which were paid, the National Bank enforced a deposit of $10,709.31, from the borrower, and the use of that sum was alleged to have been worth to the lender and to the borrower at least 7 per cent. per annum, and that it was also knowingly done for the purpose of exacting usury.

THE DEFENDANT BANK IS LIABLE TO THE PENALTY, EVEN WITHOUT THE ENFORCED DEPOSIT, FOR EVERY ONE OF THE DISCOUNTS EXCEEDED A RATE OF .07408 per cent. per annum, which is the highest rate of discount allowed in Georgia.

The discounts in loans Numbers 1, 2, 3, 5, 6, 7, 8, were at a greater rate than a computation of 8 per cent. per annum figured on the notes for the time they ran.

The discounts in all of the other loans, except the 14th, were at a less amount than 8 per cent. calculated on the face of the note, but exceeded .07408 per cent. allowed by Georgia.

The discount on the 14th loan was exactly calculated at 8 per cent. on the face of the note, and therefore the 14th loan is in fact the only loan on which the Defendant did exact a discount calculated exactly at the rate of 8 per cent. per annum on the face of the note.

We again call the Court's attention to the fact that cases outside of Georgia have no bearing on the question, and in the Loganville Bank case, 143 Ga. 302, our Supreme Court disposed of previous Georgia cases which were all held obiter in Patton vs. Bank of LaFayette, 124 Ga. 965, and the Court proceeded to show that the construction of the Georgia statute in applying the rate allowed **individuals,** to banks, did not recognize any custom of banks charging

discounts at highest rates, and distinctly ruled that such practice was usury in Georgia. The Court in that case said, page 305:

> "The real principal of his obligation is the amount he actually received. When he pays the principal as stated in his obligation from which the maximum rate of interest was deducted in advance, he pays a sum in excess of that which he received, and interest on it."

Loganville Banking Co. vs. Forrester, 143 Ga. 305.

So remarkably and extremely erroneous are the rulings of the Georgia Courts and contentions of the learned opposing Counsel in support of them, that we have taken the pains to point out with precision the FACTS, ALL OF WHICH ARE ADMITTED, and which we contend should lead to no other result, than a reversal of the judgment sought.

We submit that two other misstatements appear in the opposing Counsel's brief.

They claim that the Court of Appeals of Georgia held in this case that the pleading of usury did not comply with the Georgia statute, and that therefore no recovery could be had. (Page 45, his brief.)

The Court of Appeals erroneously treated as a "second ground of complaint," whereas the grounds of complaint were not segregated in the petition, the usury by virtue of the enforced deposit, and they disposed of that question by misconstruing the language in Counsel's brief, which explained why the amendment was filed reducing the amount sued for, by twice 7 per cent. calculated on the enforced deposit, because that amount, 7 per cent., had not as such been paid. Of course, the usury existed by the excessive discounts, and by the enforced deposit, the payments of the

discounts being themselves the payment of usury. But the Court overlooked this significant fact, that the discounts had been paid.

The Court of Appeals of Georgia merely held that as to the ENFORCED DEPOSIT, as Counsel for Plaintiff stated in his brief that 7 per cent. interest had not been paid on same, it could not be received.

And on that branch of the case held that the Plaintiff could not recover for usury paid solely because of the enforced deposit, as the Court overlooked the fact that it had been paid, when the discounts were paid.

But the Court of Appeals in no place in its decision held that there was any **Georgia statute** of pleading usury which was not complied with by Plaintiff, and which affected Plaintiff's right of recovery of the INTEREST PAID, i. e., THE EXCESSIVE DISCOUNTS CHARGED WHICH HAD BEEN PAID.

So that there was no construction of any Georgia statute binding on this Court. On the contrary, in our main brief we have shown that the EXACT usury need not be shown under the Georgia statute except only in those cases where THE USURY ITSELY is sought to be recovered. And that is not this case, for we sue for twice all interest paid.

The other contention of opposing Counsel is contained on page 45 of his brief, where they say it is necessary that the amount of usurious interest paid should be alleged in order to warrant a recovery.

If they mean by that that the Plaintiff must set forth that he has PAID the lender usury, in order to recover twice ALL interest paid, we agree with him, and the pleading in this case compl'es with that rule, for it clearly shows the excessive charges of discounts and the payment of the same by borrower to lender.

But the decisions he cites do not support what we conceive to be the inference he draws from them and for which he contends, namely, that in order to recover, the pleadings must show PRECISELY HOW MUCH in excess of lawful interest the borrower charged, because of an enforced deposit. On the contrary, all that the borrower need do is to show that he has PAID EXCESSIVE INTEREST CHARGES, which are usurious under the state law, and if usurious, then it need not appear HOW GREATLY USURIOUS the transactions may be, if the INTEREST charged has been paid.

Hence we have fully complied with all requirements on that score.

We call the Court's attention to the primary error in the Court of Appeals' decision in this case, transcript, page 16—in which the Court attempts to formulate our contentions; this is its language:

"For a national bank to receive on any loan or discount more than the rate of interest allowed by the law of the State where it is located is a usurious transaction; in Georgia eight per cent. interest in advance by way of discount is usurious; therefore, for a national bank in Georgia to **receive eight per cent. in advance by way of discount** is usurious."

The error was that the Court omitted to put the words "MORE THAN" before the word "eight," so that it would have read:

"Therefore, a national bank in Georgia to receive more than eight per cent. in advance by way of discount is usurious."

Had it incorporated those two words in its opinion, the remaining five pages of printed matter, involving much labor to that Court, would have been dispensed with, for it could not have reached the conclusion it did, with its major premise properly constituted and in accord with the facts as pleaded.

Respectfully submitted,

FREDERICK T. SAUSSY,
Counsel for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

THOMAS J. EVANS,
Sole Surviving Receiver of the Citizens & Screven County Bank.

vs.

NATIONAL BANK OF SAVANNAH.

No. 67

Petition for Writ of Certiorari to the Court of Appeals of the State of Georgia.

SUPPLEMENTAL BRIEF FOR RESPONDENT.

ANSWER TO FURTHER CONTENTIONS OF PETITIONER.

None of the cases cited by counsel for petitioner on the addendum to his brief attached at page 18 decide as he has cited them.

Counsel there cites the following: "The measure of the rights of the National Bank to interest is the State Law."
Union National Bank vs. Louisville, etc., R. R., 163 U. S., 330-331.

A reading of that case will show that the court did not hold this, but, on the contrary, stated as follows:

"It may be said that the rights of a national bank as to interest are given by the Federal statute, that the reference to the state law is only for a measure of those rights; that a misconstruction of the state law really works a denial of the rights given by the Federal statute, and thus creates a Federal question. Miller vs. Anderson ("Miller vs. Swan"), 150 U. S., 132 (37:1028). A sufficient answer is, that the true construction of state legislation is a matter of state jurisprudence, and while the right of the national bank springs from the act of Congress, yet it is only a right to have an equal administration of the rule established by the state law. It does not involve a reservation to the national courts of the authority to determine adversely to the state courts what is the rule as to interest prescribed by the state law, but only to see that such rule is equally enforced in favor of national banks."

The remainder of the decision is quoted in the main brief for respondent on page 41.

Besides that case is absolute authority for the proposition that this court will decide the case at bar in favor of respondent. It decides as follows:

"In Eustis vs. Bolles, 150 U. S., 361, 366, it was held: 'It is likewise settled law that, if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment'."

It is clear in the case at bar that another question was raised, namely, the question of pleading usury under the Georgia law.

Therefore as the court of appeals decided the question of pleading adversely to petitioner, in which no Federal question was involved, this court will in the terms of the decision just cited sustain the judgment of the court below.

Counsel says that the cases cited by him decide that "The Georgia statute as to pleading the exact amount of usury charged has not been applied to any cases except where one seeks to recover or set off usury as such, where exact figures are necessary."

The cases referred to by him are those where usury is invoked in order to have a deed declared void, but the decisions hold where the suit is for "the purpose of recovering usurious payments of money," pleading must conform to the statute in pleading.

The suit at bar is clearly a case for "recovering usurious payments of money."

Thus, in the case:

Carswell vs. Hartridge, 55 Ga., 412, 415,

the Supreme Court of Georgia says in answer to a contention that "the plea did not set out the usury with the amplification and minuteness required by section 3419 of the Code of 1868. We think this ground of objection untenable for the section referred to applies to pleas in a different **class of actions, those for money, where precise amounts are material.**" (Italics ours).

Again citing that case, the Supreme Court of Georgia says, "In pleading usury for the purpose of avoiding the

deed, it is unnecessary to set it out with **all the particularity required in pleas of usury to actions for money.** Carswell vs. Hartridge, 55 Ga., 412."

> Hollis vs. Covenant B. & L. A., 104 Ga., 318, 322 (Italics ours).

In citing the two cases just mentioned the Supreme Court of Georgia says, "Where a suit is not instituted for the purpose of recovering usurious payments of money, the same particularity of averments is not required."

> King vs. Moore, 147 Ga., 43.

Therefore the Supreme Court of Georgia clearly decides that where the suit is for the purpose of recovering usurious payments of money, the Georgia statute does apply.

Further it is quite clear that the statute applies for this reason, if the National Bank of Savannah was entitled to charge interest at 8 per cent. in advance, then there were no payments of usurious interest, if it was not entitled to charge 8 per cent. in advance there were usurious payments of interest, but, as we think we have definitely shown it was entitled to charge 8 per cent. in advance, **no statement of the amount of usury is correctly pleaded.**

The suit being for usurious payments of money and there being no pleading showing under the terms of the statute **"the amount of usury agreed upon, taken or reserved"** and therefore there being no statement of any usury, the petition under the terms of the statute shows no usury and no usurious payments, and there can be no recovery by the petitioner.

SUMMARY OF AUTHORITIES

In order that the court may see the weight of authority which decides that it is not usurious to charge in advance interest at the highest rate allowed by law, we append a table of the cases cited in this brief showing that that doctrine has been decided and approved in 12 cases decided by the Supreme Court of the United States and 6 cases decided by the Circuit Courts and Circuit Courts of Appeal of the United States, in 87 cases decided by the courts of 26 states, and one case in the District of Columbia, and 6 cases decided by the English courts.

This will appear as follows:

Supreme Court of the United States, 12 cases:

Fleckner vs. Bank of U. S., 8 Wheaton, 338 ---------- 16, 19, 20, 21, 25, 36, 64
Thornton vs. Bank of Washington, 3 Peters, 36---------- 25, 28
Bank of Metropolis vs. Moore, 2 Fed. Cas., 901; 13 Pet., 302---------- 26, 28
Myer vs. City of Muscatine, 1 Wall., 384---------- 25
Farmers Mechanics National Bank vs. Dearing, 91 U. S., 29 ---------- 11, 12, 13
Wheeler vs. Union Nat. Bank, 96 U. S., 268---------- 25, 39
Barnett vs. Nat. Bank, 98 U. S., 555---------- 12, 13, 34
National Bank vs. Johnson, 104 U. S., 271---18, 19, 24, 25, 37
Fowler vs. Trust Co., 141 U. S., 384---------- 17, 21
Haseltine vs. Bank 183 U. S., 134---------- 13, 14
Morris vs. Third Nat. Bank, 142 Fed., 25; 201 U. S. 649 ---------- 18, 24, 36
McCarthy vs. First Nat. Bank, 223 U. S., 493--- --22, 36, 45

Circuit Court and Circuit Courts of Appeal of the United States, 6 cases:

Alexandria Bank vs. Mandeville, 2 Fed. Cases No. 850--- 28
U. S. Bank vs. Crabb, 2 Fed. Cas. No. 913---------- 28
McLean vs. Lafayette Bank, 2 Fed. Cas. 8888---------- 28

Minnesota, 1 case:

Smith vs. Parsons, 55 Minn., 520 30

Mississippi, 1 case:

Planters Bank vs. Snodgrass, 4 Howard (Miss.), 637 20

Nebraska, 3 cases:

Rose vs. Munford, 36 Neb., 148 27
Sanford vs. Sundquist, 40 Neb., 414 27
Foster vs. Pitman, 89 N. W., 763 27

New York, 17 cases:

Marvine vs. Hymer, 12 N. Y., 223 30
International Bank vs. Bradley, 19 N. Y., 245 30
Salina Bank vs. Alvord, 31 N. Y., 473 30
Bank vs. Savery, 82 N. Y., 291 19
Hawks vs, Weaver, 46 Barb., 164 30
Bloomer vs. McInerney, 30 Hun., 201 30
New York Firemen Ins. Co. vs. Sturges, 2 Cow. (N. Y.), 664 30
New York Fireman Ins. Co. vs. Ely, 2 Cow. (N. Y.), 678.. 30
Bank of Utica vs. Wager, 2 Cow., 767 ..... 20, 30
Utica Bank vs. Smalley, 2 Cow. (N. Y.), 770, 8 Cow. (N. Y.), 398 30
Manhattan Co. vs. Osgood, 15 Johns (N. Y.), 162; 3 Cow. (N. Y.), 612 30
Utica Bank vs. Phillips, 3 Wend. (N. Y.), 408 30
Bank of Geneva vs. Howlett. 4 Wend., 332 20
Utica Ins. Co. vs. Bloodgood, 4 Wend. (N. Y.), 652 30
Mowry vs. Bishop, 5 Paige (N. Y.), 98 30
Anderson vs. Schenck, 1 N. Y. Leg. Obs., 107 30
Fidelity Loan Assn. vs. Connolly, 95 N. Y. S., 576 30

New Jersey, 1 case:

Hoyt vs. Bridgewater Co., 6 N. J. Eq., 253 ---------- 27

North Carolina, 2 cases:

State Bank vs. Hunter, 12 N. C., 100 ---------- 30
Crowell vs. Jones, 167 N. C., 386 ---------- 30

Ohio, 4 cases:

Lafayette Bank vs. Findlay, 1 Ohio Dec., 49 ---------- 31
Monnett vs. Sturges, 25 Ohio St., 384 ---------- 30
Cook vs. Courtright, 40 Ohio St., 28 ---------- 30
Penn Mutual Life Ins. Co., 40 Ohio St., 260 ---------- 30

Oklahoma, 2 cases:

Metz vs. Winne, 15 Okla., 1 ---------- 27
Covington vs. Fisher, 22 Okla., 207 ---------- 27, 31

South Carolina, 6 cases:

Planters Bank vs. Bivingsville Cotton Mfg. Co., 11 Rich. L. (S. C.), 677 ---------- 31
Carolina Sav. Bank vs. Parrott, 30 S. C., 61 ---------- 31
Newton vs. Woodley, 55 S. C., 132 ---------- 27
Heyward vs. Williams, 63 S. C., 470 ---------- 27
Merchants, etc., Bank vs. Sarratt, 77 S. C., 141 ---------- 31
Tate vs. Lenhardt, 96 S. E., 720 ---------- 27

Tennessee, 1 case:

Wetmore vs. Brien, 3 Head. (Tenn.), 723 ---------- 31

Texas, 2 cases:

Webb vs. Pahde, 43 S. W. (Tex.), 19 ---------- 31
Geisberg vs. Mutual Bldg., etc., Assn., 60 S. W. (Tex.), 478 ---------- 31

Vermont, 2 cases:

Burlington Bank vs. Durkee, 1 Vt., 399 31
St. Alban's Bank vs. Scott, 1 Vt., 425 31

Virginia, 6 cases:

Parker vs. Cousins, 2 Grat. (Va.), 372 31
Stribbling vs. The Bank, 5 Rand. (Va.), 132, 144 ..... 20, 31
Grigsby vs. Waver, 5 Leigh, 213 20
Crump vs. Trytitle, 5 Leigh (Va.), 251 31
North Carolina State Bank vs. Cowan, 8 Leigh (Va.), 238 31
Baker vs. Lynchburg National Bank, 91 S. E. (Va.), 157 .. 22

English, 6 cases:

Hamlett vs. Yea, 1 B. & P., 144 28
Marsh vs. Martindale, 3 B. & P., 154 28
Floyer vs. Edwards, 1 Cowp., 112 28
Auriol vs. Thomas, 2 T. R., 52 28
Maddock vs. Hammett, 7 T. R., 180 28
Lloyd vs. Williams, 2 W. Bl., 792 28

We respectfully submit that we have shown on the only Federal question, the court below committed no error and that on the other questions, this court will take no action.

The judgment of the court below should be affirmed.

All of which is respectfully submitted.

JACOB GAZAN,
EDWARD S. ELLIOTT,
Counsel for Respondent.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 67.

THOMAS J. EVANS, SOLE SURVIVING RECEIVER OF THE CITIZENS & SCREVEN COUNTY BANK,

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NATIONAL BANK OF SAVANNAH.

SECOND SUPPLEMENTAL BRIEF FOR RESPONDENT.

JACOB GAZAN,
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SECOND SUPPLEMENTAL BRIEF FOR RESPONDENT.

On page 7 of his supplemental brief in this case, counsel for petitioner says:

> "We submit that two other misstatements appear in the opposing counsel's brief.
>
> "They claim that the Court of Appeals of Georgia held in this case that the pleading of usury did not comply with the Georgia statute, and that therefore no recovery could be had."

Again on page 8:

> "But the Court of Appeals in no place in its decision held that there was any *Georgia statute* of pleading usury which was not complied with by plaintiff, and which affected plaintiff's right of recovery of the *interest paid, i. e., the excessive discounts charged which had been paid.*" (Italics in original.)

The decision of the Court of Appeals of Georgia referred to is found on page 21 of the record, at the bottom, and we quote the following therefrom:

> *"Referring to the petition in the present suit as amended, we find no allegation setting forth the amount of usury paid by plaintiff to defendant by reason of such required deposit.* On the contrary, the original averment setting forth the amount of such usurious payment has been stricken by plaintiff, for the reason as stated in the brief of its counsel, that *'the interest on that amount, while lost to the plaintiff, was not paid to the defendant.'* In other words, the plaintiff cannot recover, under the statute, for interest lost but for usury paid; and while the requirement of the deposit, on the conditions named, was really in itself a usurious transaction, *the plaintiff could not recover the penalty computed on that amount."*

Clearly, the Court of Appeals decided that none of the usury was properly pleaded.

This is so far as shown on page 63 of main brief for respondent, *all the grounds of special demurrer of respondent were sustained.*

Decisions of the Supreme Court of Georgia there quoted show that this is true in the case at bar.

> De Loach *vs.* Georgia Co., 144 Ga., 678, h. n. 1, and cases cited.

Now among the special grounds of demurrer were the following:

> "2. *That the said petition is a petition to recover double interest by reason of usury charged and usury is not set forth with sufficient particularity.*"

Attention is also called to the 3d, 4th, and 5th grounds of demurrer.

> "6. *That the second portion of the third paragraph of said petition is vague, indefinite, and insufficient and does not of itself or as construed with the rest of the petition constitute usury under the laws of the United States.*"

Attention is called, also, to paragraph 7 of the demurrer. See Record, pp. 10, 11.

As all these grounds of demurrer were sustained it is quite clear that the decision of the Court of Appeals of Georgia did decide the question of pleading under the Georgia statute and that no Federal question was involved in the pleading, and the court below having decided questions, other than Federal questions, in the case at bar, the decision of the court below will be affirmed.

All of which is respectfully submitted.

JACOB GAZAN,
EDWARD S. ELLIOTT,
Counsel for Respondent.